Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-65

REPUBLICAN PARTY OF SHELBY COUNTY, TENNESSEE,
Appellant,
VS.
ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and
THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

JURISDICTIONAL STATEMENT

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THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

JURISDICTIONAL STATEMENT

Appellant appeals from the April 5, 1976 judgment of the United States Three-Judge District Court for the Western District of Tennessee, West-

ern Division. The Opinion of the Court was entered on March 25, 1976, and has not yet been reported. Copies of the majority opinion, concurring opinion, and dissenting opinion are attached hereto as Appendices A, B, and C, respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The individual appellees, Roscoe Dixon, et al., in July of 1974, sought an injunction in the Court below against enforcement of Tennessee Code Annotated, S2-1603, which in 1972 provided for the redistricting of Tennessee's eight congressional districts and such appellees also sought a declaratory judgment by the Court below that such congressional districts were unconstitutionally apportioned and that the districts should be altered by the District Court. The District Court refused to grant injunctive relief at that time because of the pendency of the 1974 congressional elections. The District Court in a per curiam opinion of December 26, 1974, held that, based on 1970 Decennial Census population figures, under S2-1603, certain Tennessee congressional districts were unconstitutionally malapportioned, but deferred implementation of this finding in order to afford the Tennessee General Assembly the opportunity to correct the malapportionment. The Tennessee General Assembly in 1975 did not amend its congressional districting statute. Appellant intervened in this cause in 1975 and urged that the Court below consider 1974 population estimates of the Bureau of the Census in determining the relief to be granted, which Census Bureau estimates show that

any malapportionment that may have existed in 1970 had more than been corrected by subsequent population shifts. The suit was brought by Appellees pursuant to Article I, Section 2 and the Fourteenth Amendment to the United States Constitution, 28 U.S.C., Sections 1343 (3), 1343 (4), 2201, 2202, 2281, and 2284, and 42 U.S.C., Section 1983.

The Order granting the injunctive relief sought by Appellees and holding Tennessee's congressional districting statute unconstitutional was entered on April 5, 1976. A copy of such Order is attached as Appendix D.

The notice of appeal was filed in U. S. District Court, Western District of Tennessee, Western Division, on April 30, 1976, and a copy of the notice is attached as Appendix E.

The Supreme Court of the United States has jurisdiction of this appeal by virtue of 28 U.S.C., Section 1253 and Section 2101 (B).

Cases believed to sustain jurisdiction are: **Wesberry v. Sanders,** 376 U.S. 1 (1964); **Kirkpatrick v. Preisler,** 394 U.S. 526 (1969); and **White v. Weiser,** 412 U.S. 783 (1973).

STATUTE INVOLVED

The validity of Tennessee Code Annotated, Section 2-1603, as amended in 1972 to provide for Tennessee's congressional districts, is here involved. The statute as amended reads as follows:

> "2-1603. **Congressional Districts**—The state of Tennessee is divided into the following eight (8) congressional districts:
>
> (1) The first congressional district is compos-

ed of the counties of Carter, Cocke, Grainger, Greene, Hamblen, Hancock, Hawkins, Jefferson, Johnson, Sevier, Sullivan, Unicoi and Washington.

(2) The second congressonal district is composed of the counties of Blount, Campbell, Claiborne, Knox, Loudon, McMinn, Monroe, Scott and Union.

(3) The third congressional district is composed of the counties of Anderson, Bledsoe, Bradley, Hamilton, Marion, Meigs, Morgan, Polk, Rhea, Roane and Sequatchie.

(4) The fourth congressional district is composed of the counties of Bedford, Cannon, Clay, Coffee, Cumberland, DeKalb, Fentress, Franklin, Grundy, Jackson, Lincoln, Macon, Marshall, Moore, Overton, Pickett, Putnam, Rutherford, Smith, Sumner, Trousdale, Van Buren, Warren, White and Wilson.

(5) The fifth congressional district is composed of the counties of Cheatham, Davidson and Robertson.

(6) The sixth congressional district is composed of the counties of Chester, Decatur, Dickson, Fayette, Giles, Hardeman, Hardin, Henderson, Hickman, Houston, Humphreys, Lawrence, Lewis, McNairy, Maury, Montgomery, Perry, Wayne, Williamson and the following voting wards, precincts and districts of the city of Memphis and Shelby County: 56-2, 60-5, 67-1, 67-2, 67-3, 68-2, 73-1, 73-2, 74-1, 74-2, 78-1, 78-2, 78-3, 79-1, 79-2, 80, 81, Capleville, Collierville, Forest Hills, Germantown and Ross' Store.

(7) The seventh congressional district is composed of the counties of Benton, Carroll, Crockett, Dyer, Gibson, Haywood, Henry, Lake, Lauderdale, Madison, Obion, Stewart, Tipton, Weakley and the following voting wards, precincts and districts of the City of Memphis and Shelby County: 68-1, 69-1, 69-2, 70-1, 70-2, 71-1, 71-2, 72-2, 72-3, Arlington, Bartlett, Brunswick, Cordova, Eads, Ellendale, Kerrville, Locke, Lucy, McConnell's, Millington, Morning Sun, Mullins, Raleigh I, Raleigh II, Raleigh III, Scenic Hills, Stewartville and Woodstock.

(8) The eighth congressional district is composed of all the remaining voting wards, precincts, and districts of the City of Memphis and Shelby County not established as a portion of the sixth and seventh congressional districts as set out above."

QUESTIONS PRESENTED BY THE APPEAL

1. Having determined that Tennessee's congressional districting statute was unconstitutional, was the District Court, as a matter of law in fashioning a remedy in 1976, confined to the 1970 decennial census population figures?

2. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 in judicial enactment of a new congressional redistricting statute?

3. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 to show that a malapportionment that may have existed in 1970 has corrected itself as a result of population shifts?

STATEMENT OF THE CASE

In 1972 the Tennessee General Assembly enacted into law Tennessee Code Annotated, Section 2-1603, which provided for the redistricting of Tennessee's eight congressional districts, based on populaton pursuant to the 1970 Decennial Census. The 1972 congressional elections in Tennessee were held pursuant to such statute. In July of 1974, the individual appellees, Roscoe Dixon, et al., sought an injunction in the District Court against enforcement of such redistricting statute and also sought a declaratory judgment that such congressional districts were unconstitutionally apportioned and should be altered by the District Court. Since the 1974 congressional election process had begun, the District Court refused to grant injunctive relief at that time to appellees. The parties stipulated that the population of the sixth and eighth congressional districts of Tennessee, pursuant to the 1970 U.S. Census, as interpolated by the Memphis and Shelby County Planning Commission, was 473,060 and 510,031, respectively, and that the optimum population per district was 490,615. In a per curiam opinion of December 26, 1974, the District Court held that, based on the stipulated 1970 Census population figures, the sixth and eighth congressional districts of Tennessee

were uncontitutionally malapportioned. The District Court deferred any action on this opinion in order to afford the Tennessee General Assembly the opportunity to study, investigate, and act, as appropriate, with respect to any necessary redistricting. Specifically the opinion provided that the legislature "... is free to investigate the relative current populations of the districts and to base such plan on the results of such investigation provided it meets the standards herein delineated." The Tennessee General Assembly in 1975 considered the redistricting issue but did not amend its congressional districting statute.

Appellant intervened in this cause in 1975 and urged that the District Court consider 1974 population estimates of the Bureau of the Census, which show that any malapportionment that may have existed between the sixth and eighth congressional districts of Tennessee had been cured by population shifts in the intervening period. Specifically, the population of the sixth district had increased from 473,060 to 518,000, and the population of the eighth district had decreased from 510,031 to 504,000, so that the sixth district, rather than having 37,000 **less** population than the eighth district, now has 14,000 **greater population** than the eighth district. These estimates of the population of congressional districts of the United States were published on March 21, 1975, as Department of Commerce News, CB 75-64. In June of 1975, by a publication of the Department of Commerce, Bureau of the Census (Series P-25, No. 587), the Census Bureau estimates were explained in detail. The Census Bureau found that compari-

sons of the administrative determinations with federal-state co-op estimates were favorable and the "level of accuracy suggested by these averages is quite good," and, in summary,

> "yields results that compare favorably with existing methods and provides acceptable estimates, systematically, in geographic detail on a current basis not available from any other known source (short of a full-scale census)."

Furthermore, it was concluded that

> "the level of accuracy of the estimates implied by the test results would appear to be acceptable for most uses where current population figures are required. It is in line with the quality level recommended or proposed for a variey of legislative purposes."

The Census Bureau obtained data, for purposes of the estimates, for census tracts within counties from National Planning Data Corporation. Appellant presented into evidence the deposition of Mr. Peter Francese of National Planning Data Corporation, which supported the accuracy and validity of the 1974 estimates to within one percent (1%) for a congressional district. Appellees questioned the accuracy of these estimates by testimony from Professor Donald Purcell, an expert hired by appellees.

The District Court's majority opinion of March 25, 1976, determined as a matter of law that it was not confined to 1970 census figures and could consider the 1974 Census Bureau estimates, but that the 1974 Census Bureau estimates for the congressional dis-

tricts were not sufficiently accurate for use in fashioning a congressional redistricting plan or in showing that a previous constitutional malapportionment had been cured. The Court held that the sixth and eighth congressional districts should be altered by adding 17,201 persons to the sixth and substracing an equal number of persons from the eighth congressional district. The concurring opinion of the District Court joined in the result reached by Judge Brown, but held that as a matter of law, the District Court was bound by the 1970 Decennial Census and should not consider any estimates or other figures showing population shifts in the interim. The dissenting opinion held that the Census Bureau estimates were sufficiently valid ,and should have been considered, to show that the unconstitutional apportionment that existed in 1970 had been more than corrected by 1974 as a result of population shifts, and that the action taken by the Court actually aggravated the population disparities between the districts.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In the past several years the law regarding the proper standard to be applied regarding Congressional Redistricting has been expanded and clearly defined by the Supreme Court. **Wesberry v. Sanders,** 376 U. S. 1 (1964); **Kirkpatrick v. Preisler,** 394 U. S. 526 (1969); and **White v. Weiser,** 412 U. S. 783 (1973). However, the means of implementing Congressional Redistricting and the standards to be followed are unclear, particularly in cases of redistricting in mid or late decade, when the decennial census may be stale and population changes have occurred in the interim. The three separate decisions by the three judge court in this case are indicative of the lack of certainty regarding proper remedies in such a case.

1. The Decennial Census As A Matter of Law?

The majority and concurring opinions in this case differed as to whether the Court as a matter of law in determining the action, if any, to be taken in congressional redistricting in 1976, should be confined to the 1970 decennial census. The dissenting opinion agreed with the majority that as a matter of law the Court was not confined to the 1970 decennial census.

Appellant asserts that **current** population figures, which are sufficiently valid and accurate for use, should be considered and utilized by a District Court in fashioning relief in a Congressional Redistricting case. All the following cases, with either the approval of the Court, or by the action of the Court itself, used data other than a decennial U. S. Census in fashioning a congressional redistricting plan: **Exon v. Tiemann,** 279 F. Supp. 609 (D. Neb., 1968); **Meeks v. Avery,** 251 F. Supp. 245 (E. D. Kan., 1966); and **Gong v. Kirk,** 278 F. Supp. 133 (S. D. Fla., 1967, aff'd. 389 U. S. 574 (1968).

Further, the following cases, although not actually using data other than a decennial U. S. Census, contain language approving the use of such other information in congressional redistricting cases: **Kirkpatpatrick v. Preisler,** 394 U. S. 526 (1969); **Wells v. Rockefeller,** 273 F. Supp. 984 (S.D.N.Y.D.C., 1967), aff'd. in part and reversed in part, 398 U. S. 901 (1969); and **Calkins v. Hare,** 228 F. Supp. 824 (E. D. Mich., 1964).

The Supreme Court has been primarily concerned with providing general guidelines rather than with fashioning specific remedies, and therefore it has not directly addressed itself to the concern of what data may or should be used in congressional redistricting. The cases that are most pertinent to the instant case are those cases of the mid and late 1960's in which a prior finding had been made of unconstitutionality of a congressional districting statute and the Court had to act on its own to implement a plan or the Court had to consider a new plan passed by the state legislature.

Just such situations were **Meeks, Exon and Gong,** supra. The **Meeks** case involved consideration of a 1965 Kansas statute which had provided for congres-

sional redistricting in Kansas after the Court had declared the 1961 Kansas congressional districting plan unconstitutional because of impermissibly large population variances. The 1965 statute was based upon a 1964 state census which contained significantly different figures from the 1960 federal census, and which considered college students, military persons, and prisoners differently from the federal census. Nonetheless, this state census was approved for use over the federal census and the plan was upheld.

The 1968 **Exon** case was preceded by **Exon v. Tieman, 279** F. Supp. 603 (1967), which found unconstitutional, based upon impermissible population variances, the 1961 Nebraska congressional districting statute, based upon the 1960 federal census. The defendants introduced 1966 population **estimates** prepared by the Bureau of Business Research of the University of Nebraska in order to show that the population disparities of 1960 had been to some extent corrected by population shifts since that time. The Court considered such estimates (which admittedly contained a 3% margin of error), but found that the population discrepancies of 17% were still too extreme to tolerate.

"This court believes these estimates of an impartial University department are proper for consideration by this court in determining the issues to be here decided and likewise that they would be helpful to the Legslature, if assembled in Special Session, to consider avoiding electing Representatives at Large. Such estimates would appear to have

more validity than to use 1960 Census figures. However, the Legislature may find some other census or estimates even more reliable. We do not intend to say in this opinion that the Bureau of Business Research estimates are the best standard to use if redistricting is attempted. **We are saying that better evidence of population in 1967 is available than the blind use of the 1960 Census.** (emphasis added) Cf. Meeks v. Avery, D. C., 251 F. Supp. 245. It is well stated in Wells, supra:

'It is not for this court to dictate to the Legislature the methods whereby substantial equality is to be attained. It may be suggested, however, that population statistics as of December 31, 1966, might well be capable of reasonable ascertainment from various sources to which the Legislautre would have access. Such current figures should tend to reflect the radical population changes in the areas where such changes have occurred. * * * Even if perfection cannot be achieved between now and 1973, improvement is worth the effort.' "

This case is particularly pertinent, since this Intervening Defendant has submitted proof to the Court that action by this Court, as urged by appellees in removing population from the 8th District, would create a constitutionally impersimmible imbalance greater than the imbalance originally complained of by appellees. Such would be the result of a "blind" adherence to the 1970 Census (as suggested by the concurring Opinion) without considering population shifts and trends since that time.

Nebraska in early 1968 enacted a congressional redistricting statute in order to avoid at large elections, and this statute considered both the 1966 University of Nebraska **estimates,** referred to above, and the 1967 Legislative research bureau **projections. Exon** II, at p. 611, contains a population comparison of the statute considering the 1960 census figures and each of the two estimates. Using 1960 census figures this plan was clearly unconstitutional. It is interesting to note that the Court was considering three districts, just as this Court is currently considering proper apportionment between three districts. **The** Court upheld the use of the projections or estimates, and declared the statute constitutional.

Exxon II analyzed and commented upon **Gong,** supra, and noted that its use of other than census data had been approved by the Supreme Court's affirmance of that decision (**Exon II** was not appealed and has not been overruled). **Gong** involved Florida's congressional districting, which followed the familiar pattern of finding of unconstitutionality but withholding relief in order to give the legislature a chance to act (1964); a legislative redistricting statute (1965); and a finding (1967) that this statute was unconstitutional. Even though the legislature only considered 1960 census figures, the Court in fashioning relief used current voter registration figures in order to reflect population trends and **because the census data did not correspond with the presently established precincts.**

Clearly that Court was concerned with urban areas, just as this Court is, and that Court faced the

same problem as here: (1) legislative redistricting statute unconstitutional (2) decennial census figures stale (1967); and (3) decennial census figures unavailable for precincts as presently constituted. The reasonable, common sense approach of that Court was affirmed by the Supreme Court without comment on this issue.

The Supreme Court then decided **Kirkpatrick,** supra, which case utilized 1960 decennial census figures, and which did not have in evidence for consideration any other figures. The Court did indicate that data other than the decennial census could be used. "But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable." at p. 1231. The Court also recognized that population trends and shifts would be considered, "Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." at p. 1231.

In a concurring opinion, Justice Fortas also approved the recognition of such trends, at p. 1232:

> "In my view the State could properly arrive at figures for current population by taking the latest census returns and making modifications to allow for population movements since the last census (which the Court seems to find acceptable)."

He also noted the problem of stale census figures, in view of the Court's insistence on mathematical precision.

> "The legislature's plan here under review was enacted in 1967. Assuming perfect precision for the

1960 census when taken, by 1967, because of the movement of population within the State as well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base here so zealously protected by the Court."

At p. 1233.

The Wells case upheld the District Court's finding that New York's Congressional Redistricting statute was unconstitutional, but that the 1968 election should have been held under that plan. The Supreme Court reversed the District Court's holding that the 1970 elections could also be held under that same plan, and remanded for enactment or adoption of a constiutional plan. The Court gave no specific guidance as to the data that could be considered. The District Court's opinion contained the suggestion (quoted above in **Exon** I) that 1966 estimates might properly be utilized in congressional districting. That court in a specific section titled "The Remedy--Timetable" discussed the need for some action at that time, and the problem of the staleness of the 1960 census.

"Had the population remained static, the court could specify the 1960 census as a base. **However, no court should blind itself to the world of today.** (emphasis added). To use 1960 figures in many areas would be to enforce the disparity of which plaintiffs complain." (The court then cites examples of specific population shifts in New York).

At p. 991.

The Supreme Court's lack of comment on this issue, combined with its remand for another plan, can be reasonably interpreted as approval of such considerations in fashioning a proper remedy. **White v. Weiser,** supra, does not consider the issue and sheds no light on the problem. However, this is not surprising since it was argued and decided in early 1973 when the 1970 census information was relatively current.

In the face of these cases, appellees make much of one case involving congressional redistricting which late in the decade utilized the 1960 census figures rather than other data. **Grills v. Branigan,** 284 F. Supp. 1976 (S.D. Ind., 1968).

Branigan, supra, is one congressional redistricting case cited that considered the problem of using estimates and rejected them in favor of using admittedly state decennial census figures. The Court at p. 180, determined that:

" . . . (T)he correct basis for the apportionment of the State of Indiana should be upon the United States Decennial Census of 1960 which is judicially noticed even though it may be a fact that the census is outdated and the communities of the state have grown disproportionately in population. The eleven (11) congressmen apportioned by Congress to the State of Indiana is based upon the census conducted by the United States and not upon any other governmental or private census and cannot be changed until the next United States Census. We think the Census of 1960 must

be tolerated until the next official census in order to maintain relative political stability."

The rationale of this holding is that since the decennial census is used to apportion congressional districts **among** the states, then it must also be used to determine redistricting **within** each state. Ths concept does not appear in any Supreme Court case or any other federal case regarding congressional redistricting, and in fact this concept is directly contrary to the cases cited by this Appellant which involve Supreme Court dicta. It is asserted that the **Branigan** case, as relates to this issue, is without legal precedent, and was decided upon a fallacious understanding of the weight and scope of the federal decennial censuses, and lacks a common sense approach to the problem.

2. CENSUS BUREAU ESTIMATES

Appellant submitted proof to the District Court of 1974 Census Bureau estimates by Congressional Dis tricts, which estimates showed that the Sixth and Eighth Congressional Districts of Tennessee (which the District Court had found to be unconstitutionally apportioned pursuant to the 1970 Census) had experienced population shifts as follows:

	1970 Census	1970 Population Percentage Variance	1974 Census Bureau Estimates	1974 Population Percentage Variance
6th District	473,060	—3.57	518,000	+0.36
8th District	510,031	+4.52	504,000	—2.34

These estimates show that, due to population shifts in the interim, the malapportionment that may have existed in 1970 had been more than cured by 1974.

The high degree of accuracy of these estimates was referred to in the Statement of the Case, and is discussed in detail in the Dissenting Opinion. The Majority Opinion found that as a matter of law the District Court was not confined to the 1970 Decennial Census, but then found that the 1974 Census Bureau estimates were not sufficiently reliable to be utilized either in fashioning a new plan, or in showing that the malapportionment had corrected itself.

This appears to be a factual determination not ordinarily appropriate for appeal. However, it is in effect a legal finding that no population estimates will satisfy this District Court's high standard for accuracy. These estimates were not from a planning commission, state agency, or even university (as in **Exon** II), but from the U. S. Census Bureau. Even the appelle's expert witness agreed that the Census Bureau has the highest reputation for validity and accuracy of its population data. These estimates were prepared and published by the Census Bureau in mid-decade for the sole purpose of showing the updated population of all congressional districts in the United States. In publishing these estimates, the Census Bureau, by Publication Series P-25, No. 587, concluded that " . . . the level of accuracy of the estimates implied by the test results would appear to be acceptable for most uses where current population figures are required. It is in line with the quality level recommended or proposed for a variety of legislative purposes." **If Census Bureau population estimates are not sufficiently valid, then appellant knows of no estimates that would be sufficiently valid.**

Appellant urges that the District Court, alternatively, could have utilized the population estimates not as building blocks to fashion a new court ordered redistricting plan, but as data to show that the previous malapportionment had been more than corrected by population shifts. Although the expert testimony differed as to the accuracy of the estimates for individual precincts (which are building blocks for a redistricting plan), both experts agreed that the estimates for an entire congressional district were very accurate, and Mr. Francese stated that this accuracy was within one percent (1%).

The District Court rejected this concept, finding that if it considered the population estimates for any districts, it should consider them for all districts. The District Court based this holding upon language in **Kirkpatrick**, p. 535 that "Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner." This statement, however, was made in the context of whether a legislature could consider or "plug-in" to a congressional redistricting plan **anticipated** population shifts. That situation is considerably different from this case where the Court was faced with the determination of whether population shifts in the interim period had corrected a prevous malapportionment involving only two of the state's congressional districts. The Court could find that the interim population shifts cured the malapportionment, not take any action, and not consider current population for all the districts. The District Court

must apply current population estimates **only where** the District Court takes some **affirmative action** such as implementing a judicially ordered redistricting plan.

The District Court's rejection of official U. S. Census Bureau population estimates for congressional districts raises a serious quetion as to whether any population estimates may be used in congressional redistricting.

CONCLUSION

The questions presented are of such impact and are so substantial as to require plenary consideration.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROSCOE DIXON, et al,

Plaintiffs

v

SHIRLEY HASSLER, Coordinator of Elections, et al,

Defendants

BEFORE: HARRY PHILLIPS, Circuit Judge; BAILEY BROWN, Chief District Judge; and HARRY W. WELLFORD, District Judge.

OPINION BY BROWN, CHIEF JUDGE.

This action was filed on July 2, 1974 by plaintiffs, who are registered voters in the 6th, 7th and 8th Congressional Districts of Tennessee, against the state Coordinator of Elections and the Shelby County Election Commissioners. They alleged in substance that the Congressional reapportionment statute, based upon the 1970 Federal census, enacted by the Tennessee legislature on April 13, 1972, (TCA S 2-1603). had brought about an unconstitutional malapportionment of those Districts. More particularly, they alleged that prior to the enactment of this 1972 statute, the Shelby County Election Commission had created some new precincts, with the result that, under the statute, the population in the area covered by some of these new precincts was assigned to the 8th District rather than, as was intended by the legislature, to the 6th and 7th Districts. Thus, it was alleged, the 8th District as so constituted by the statute had a substantially greater population than the 6th and 7th Districts. (1) Plaintiffs still further alleged that the assignment of these newly created precincts to the 8th District (that were intended to be in the 6th District) created a "pocket" of the 8th that was surrounded by the 6th District.

Plaintiffs took the position, in their complaint. that the creation of these new precincts and the assignment of them to the 8th District amounted to an

(1) Under S 2-1603, certain entire counties were assigned to the 6th and 7th Districts. Because of the large population of Shelby County, which includes Memphis and its suburbs, in order to bring about a proper apportionment it was necessary for the legislature to assign part of its wards and precincts to the 6th District, to assign part of them to the 7th District, and to assign the remainder of its wards and precincts to the 8th District. Thus, under this reapportionment statute, the 8th District was made up only of wards and precincts in Shelby County not specifically assigned by number to the 6th and 7th Districts. This meant that new precincts that were carved out of precincts assigned by their number to the 6th and 7th Districts (and as new precincts received a new number) were by the statute assigned to the 8th District rather than to the 6th or 7th District. One new precinct was so assigned to the 7th and four were so assigned to the 6th District.

unconstitutional application of the 1972 reapportionment statute by the Shelby County Election Commission and that, to correct the resulting malapportionment, the statute should be construed by this court, contrary to its plain terms, to place these newly created precincts in the 6th and 7th Districts as was actually intended by the Legislature.

Plaintiffs sought declaratory and injunctive relief prior to the primary election to take place on August 1, 1974 and to the general election to take place on November 5, 1974, and they demanded a three-judge court to hear this action.

One judge (Judge Brown) held a hearing on an application for a temporary restraining order, which was denied by memorandum and order entered on July 12, 1974.

A three-judge court was convened and held a hearing on plaintiffs' application for a preliminary injunction on July 26, 1974. At the inception of such hearing, the court announced that, due to the short time involved, it would not consider granting a preliminary injunction vis-a-vis the primary election to take place on August 1, 1974. The court then heard argument on other issues, including the issue whether this was a case that could properly be heard by a three-judge court. In an opinion filed on August 7, 1974, the court concluded that, since plaintiffs were not contending that the involved reapportionment statute was unconstitutional on its face but rather were contending only that it was being unconstitutionally applied, this case could not properly be heard by a three-judge court.

Prior to the filing of such opinion on August 7, 1974, the plaintiffs filed an amended complaint alternatively contending that, in view of the populations of these Districts as the Districts are established by the 1972 reapportionment statute, the statute is unconstitutional on its face. The court then held a hearing on the amended complaint on September 24, 1974. At such hearing the parties stipulated that the 6th, 7th and 8th Congressional Districts, as established by the involved 1972 reapportionment statute, had, according to the 1970 Federal census as interpolated by the Memphis and Shelby County Planning Commission, the following populations: 6th District, 473,060; 7th District, 487,583; and 8th District, 510, 031. (2) Following such hearing, the court filed an opinion on October 29, 1974, ruling that it would issue no order affecting the general election to take place on November 5, 1974. The principal reason stated for such ruling was that the primary elections had already been held in the Districts as then constituted, and the nominees of the respective parties had been campaigning for election in the Districts as then constituted. The reapportionment sought by the plaintiffs was taken under advisement for a later ruling.

Thus, although plaintiffs had shown, at least presumptively, that, according to the 1970 Federal cen-

(2) Such interpolation is necessary because Shelby County is divided between the three Districts and because census tracts are not congruent with precincts.

sus, the 6th and 8th Districts were clearly malapportioned by the 1972 reapportionment statute, this court, for the reasons stated, granted them no relief with respect to the August 1, 1974 primary election and the November 5, 1974 general election.

On December 26, 1974 the court filed another opinion in which it ruled that, based upon the 1970 Federal census figures, the 6th and 8th Congressional Districts were malapportioned. We pointed out that, according to such figures, the stipulated average population of all the Tennessee Congressional Districts was 490,615, that the stipulated population of the 6th District was 17,555 less than the average, and that the stipulated population of the 8th District was 22,093 more than the average. (3) We further pointed out that such stipulated population of the 7th District was only 3,432 less than the average and

(3) The incumbent Congressman in the 8th District, who had intervened, took the position that such figures were not the best evidence of the current populations of the 6th and 8th Districts and that the Districts actually were not malapportioned. He filed the depositions of the executive director of the Shelby County Election Commission and the principal planner of the Shelby County Planning Commission in support of this contention. However, in our December 26, 1974 opinion, we held that such stipulated 1970 census figures were the best evidence before the court of the populations of the Districts. This intervening party has since withdrawn from the litgation.

made no ruling as to whether the 7th District was malapportioned. The court referred to the fact, in its opinion, that the Tennessee legislature would be meeting in January, 1975, and concluded that, since apportionment is primarily a legislative task, the court would defer any action in order to give the legislature the opportunity to correct the malapportionment of the 6th and 8th Districts. We also invited the legislature to consider whether the 7th District was also malapportioned. And we pointed out, in the opinion, that the legislauture was free to investigate and to consider the relative current populations of these Districts in devising a reapportonment plan.

The Tennessee legislature, during its session beginning in January, 1975, did consider reapportonment. The House of Representatives actually passed a bill (House Bill 1100) which reapportioned the 6th, 7th and 8th Districts as would have been done by the 1972 statute had the new precincts, heretofore referred to, not been created prior to the enactment of that statute. However, this proposal was defeated in the state Senate (Senate Bill 734) and therefore no reapportionment was enacted by the legislature. (4)

(4) While we do not believe that the motivation of the legislators with respect to their action or inaction in 1972 and 1975 is relevant here, there is nothing in this record to show that the political implications of this reapportionment was not a consideration.

On July 18, 1975, the plaintiffs filed a motion for relief, alleging that the Tennessee legislature had failed to reapportion and proposing that this court reapportion these Districts in accordance with House Bill 1100 that had failed to pass the Senate. On September 29, 1975, certain registered voters of the 7th District (as the "Committee for the Preservation of the Seventh Congressional District") intervened and joined with plaintiffs in proposing to the court that these Districts be reapportioned in accordance with House Bill 1100. (5) On October 1, 1975, the defendants filed a response to plaintiffs' motion for relief, in which they proposed that the Districts be reapportioned as the 1972 statute would have done but for the creation of the aforementioned new precincts prior to the enactment of such statute. This proposal is in essence the same as that of the plaintiffs and the Committee for the Preservation of the Seventh Congressional District. Thus, at this point, all parties were in agreement as to the reapportionment that should be decreed by this court.

On October 22, 1975, the Shelby County Republican Party intervened. In its petition, it alleged that the Bureau of Census of the Department of Commerce had, on March 21, 1975, published estimates (a copy of such "provisional estimates" and explanation thereof was exhibited) showing current populations of these Congressional Districts as of July 1, 1974 as follows: 6th District, 518,000; 7th District,

(5) Under House Bill 1100, only one precinct would be moved from the 8th to the 7th District.

520,000; 8th District, 504,000. It was pointed out that, according to these publications, these estimates are reasonably accurate. It appears that these estimates are in substantial part based upon estimates made by the National Planning Data Corporation, and attached to the petition to intervene is an explanation of the technique used by that organization in making its estimates. Also exhibited to the petition are Bureau of Census estimates as to the census tracts in Shelby County and a division of such estimates between these Congressional Districts; and likewise exhibited was a 1973 report of a special census in the Raleigh area in the 7th District.

The petition of the Shelby County Republican Party then proposed, based upon the estimates, to reapportion the 6th, 7th and 8th Districts, which would have the effect of increasing the population of the 8th District and decreasing the population of the 6th and 7th Districts.

On October 29, 1975, plaintiffs filed a response to the petition of the Shelby County Republican Party in which they alleged, in substance, that the estimates were not sufficiently accurate for reapportionment purposes and that, in any event, as a matter of law this court was confined to a consideration of the 1970 Federal census figures. The court therefore required memoranda from the parties on the question whether the court could consider other than the 1970 Federal census figures. All parties except the Shelby County Republican Party took the position that as a matter of law the court could consider only the 1970

census figures. The Shelby County Republican Party, in addition to contending again that this court could and should reapportion in line with the population estimates, also suggested in its memorandum that the court might take no action on the ground that the malapportionment about which plaintiffs complained had more than corrected itself.

On December 31, 1975, a pretrial conference was held at which counsel were advised that the court had not decided whether, as a legal proposition, it could consider the population estimates that had been tendered and counsel were advised that a hearing would be held by the court on the factual validity of such estimates as well as on the legal question whether such estimates could be considered. The parties agreed that the proof in support of the validity of the population estimates and the proof attacking their validity would be submitted for deposition. (6) Accordingly, the Shelby County Republican Party took and filed the deposition of Peter K. Francese of the National Planning Data Corporation and the other parties took and filed the deposition of Donald E. Pursell, who is a labor economist and demographer on the faculty of Memphis State University. A hearing was then held on January 26, 1976, at which the factual validity, based upon the record before us, of the population estimates was argued, and also argued was the legal question whether in any event

(6) A pretrial order setting out the results of the conference was entered the same day.

the court could consider such population estimates. Both questions were taken under advisement.

We have reached the conclusion that, in making this reapportionment ruling, this court is not confined as a matter of law to the 1970 Federal census figures and that we may consider the estimates tendered by the Shelby County Republican Party. **Kirkpatrick v. Preisler,** 394 U.S. 526 (1969) at 535 and the concurring opinion at 537 so indicate. (7)

Although we have determined that this court may consider the population estimates, before considering the validity of such estimates as compared with the 1970 Federal census figures, we must first determine, as a legal proposition, the strength that the evidence supporting the estimates must have in order to overcome the presumptive correctness of the "head count" upon which the 1970 Federal census was based. **Exon v. Tiemann,** 279 F. Supp. 603 (D. Neb. 1967), while holding that estimates may be considered, does not really deal with this question. **Kirkpatrick, supra,** at 535, indicates that the estimates must have a "high degree of accuracy" if they are to overcome the presumptive correctness of the prior decennial census. While it is difficult to express such propositions in quantitative-qualitative terms, we believe that the standard to be applied is

(7) By so ruling, we do not mean to say that, if these Districts had been constitutionally apportioned following the 1970 census, they could be reopportioned based on population changes prior to the 1980 Federal census.

that the decennial census figures will be controlling unless there is "clear, cogent and convincing evidence" that they are no longer valid and that other figures are valid. This is a test that lawyers are familiar with and are accustomed to dealing with.

It has been suggested that perhaps a lesser standard should be applicable insofar as it is contended (as it is alternatively contended by the Shelby County Republican Party) that no action should be taken because the population estimates show that the malapportionment has more than corrected itself. In other words, it is suggested, even if the proof in support of the population estimates is not strong enough to support a new reapportionment, it is strong enough to require that no action be taken. However, in **Kirkpatrick, supra,** the Supreme Court said at 535: "Findings as to population trends must be thoroughly documented **and applied throughout the State in systematic, not an ad hoc, manner."** (Underlining ours). Thus it would appear that we could not properly confine the effect of our ruling, if it were based on these population estimates, to these Districts alone. (8) Moreover, to adopt a rule that would so allow the population estimates submitted here to be a proper basis for not correcting the malappor-

(8) The Shelby County Republican Party concedes that, if this court reapportioned these Districts based upon these population estimates, it would also have to reapportion any of the other Districts in this state that are, according to these population estimates, malapportioned.

tionment brought about by this 1972 statute would be to invite legislative bodies not to shoulder their reapportionment burdens after the decennial census on the ground that some evidence might later levelop that the malapportionment had corrected itself.

We turn now to consider the evidence to support the correctness of the "provisional estimates" of populations issued by the Bureau of Census on March 21, 1975, effective as of July 1, 1974. As stated, in support of the validity of such estimates the Shelby County Republican Party filed the deposition of Peter K. Francese of the National Planning Data Corporation and, in support of their invalidity, the other parties filed the depositon of Donald E. Pursell of Memphis State University.

Mr. Francese testified that the Bureau of Census purchases the estimates prepared by the National Planning Data Corporation but does not vouch for their validity, although they are very accurate. He further testified that the Bureau makes its own estimates without reliance on National Planning estimmates except where there are boundary problems as there are in the instant case in Shelby County. (There is no testimony in the record from a representative of the Bureau of Census.) Mr. Francese stated that National Planning considers four factors in arriving at an estimate: the change in population of the census tract between the 1960 census and the 1970 census; the populaton density and land area of the tract; the 1970 census data on the tract as to housing type (rental, owned, single family, etc.), housing value, income and age of people, and family

structure; and current information on the tract with respect to listed telephones and registered automobiles. Mr. Francese testified that the listed telephone and registered automobile information is purchased from another concern, is proprietary to that concern, and could not be produced for examination. Mr. Francese stated that he could not say whether, in urban areas, black population densities were greater than white population densities. He could not say for sure whether, in applying the four factors above referred to, his firm considered what percentage of the census tract was occupied by blacks and by whites. Mr. Francese testified that his firm applies an equation to the relevant factors with respect to each tract in coming up with an estimate, but that the equation was proprietary to his firm and could not be revealed.

We conclude that, without discussing at length the testimony of Donald E. Pursell, offered by the opposing parties, the Shelby County Republican Party has not presented clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current populations of these Districts and that the "provisional estimates" of the Bureau of Census are the best evidence of such populations. However, we would point out that, according to Pursell, there is no way to test the validity of National Planning's estimates without knowing the equaton used because, without the equation, one does not know the weight that was given to the variables.

Since the 1970 Federal census figures are, we hold,

controlling as to these reapportionment claims and since we have already held (on December 26, 1974) that, in accordance with such figures, the 6th and 8th Districts are malapportioned, this court will enter a decree reapportioning the 6th and 8th Districts.

With respect to the 7th District, this court did not, as stated, hold such District to be malapportioned in our December 26, 1974, opinion and expressly left the question open. We have concluded that it, too, is malapportioned. While the population of the 7th District is, according to the 1970 census, only 3,432 less than the average of the Districts in this state, **Wesberry v. Sanders,** 376 U.S. 1 (1963), requires that, as nearly as practicable, the population of the Districts be made equal. Here it is quite practicable, as Plaintiffs urge, to move to the 7th District one precinct which was assigned to the 8th rather than the 7th District because it was carved out of a 7th District precinct prior to the adoption of the 1972 statute. Moreover, such action would then make the Wolf River the boundary in this area between the 7th and 8th Districts. Indeed, the Committee to Preserve the Seventh Congressional District, intervenor, has supported this action.

As stated, the state Coordinator of Elections and Shelby County Election Commissioners propose that we reapportion these three Districts in accordance with the 1972 statute (T.C.A. S 2-1603) as the wards and precincts were constituted prior to the changes. More precisely, they propose to reapportion in accordance with T.C.A. S 2-1603 (Chap. 733 of the Public Acts of 1972) but with the wards and pre-

cincts as they were established at the time of the introduction of House Bill 1254 in 1971. (9) As also stated, in proposing that this court reapportion in accordance with House Bill 1100 that passed the House of Representatives in 1975 but was defeated in the state Senate, plaintiffs and the Committee to Preserve the Seventh Congressional District are proposing the same reapportionment.

The record shows that a reapportionment in accordance with these proposals will abolish the "pocket" where a part of the 8th District is surrounded by the 6th, (10) will, as stated, create a natural boundary of the Wolf River between the 7th and 8th Districts, and will make the populations of the three Districts, according to the 1970 census, almost equal. That is, the population of the 6th District will be 490,261, of the 7th District will be 488,864, and of the 8th District will be 491,549. (11)

A decree reapportioning these Districts as herein indicated will be entered.

Bailey Brown,
Chief U.S. District Judge
Date: March 25, 1976

(9) House Bill 1254 became TCA S 2-1603.

(10) Actually, the "pocket" of the 8th District surrounded by the 6th District in turn surrounds one precinct of the 6th District. Thus there is a "pocket" within a "pocket."

(11) An appendix hereto explains how such reapportionment will bring about this result. All figures in the appendix are based on the 1970 Federal census as interpolated.

ADDENDUM

As stated in the opinion, the populations of the three Districts according to the interpolated 1970 Federal census is:

6th District	473,060
7th District	487,583
8th District	510,031

(in the 6th District) were divided inti 73-1, 73-2 and 73-3, the last being assigned by the 1972 statute to the 8th District. (73-3 has since been subdivided, but all precincts created therefrom have remained in the 8th District.) 73-3 has a population of 8,609.

In April, 1971, ward and precincts 74-1 and 74-2 (in the 6th District) were divided into 74-1, 74-2, 74-3 and 74-4, the last two being assigned by the 1972 statute to the 8th District. In January, 1972, ward and precinct 74-2 (in the 6th District) was divided again into 74-2 and 74-5, the last being assigned to the 8th District. 74-3, 74-4, and 74-5 have a population of 8,592.

The combined populations of these new precincts that were carved out of 6th District precincts and assigned by the 1972 statute to the 8th District is 17,201.

In January, 1972, ward and precinct 72-2 (in the 7th District) was divided into 72-2 and 72-4, the latter being assigned to the 8th District. 72-4 has a populaton of 1,281.

Accordingly, if the combined populations in 73-3, 74-3, and 74-4, as such precincts were established in April, 1971, and the population of 74-5, as such precinct was established in January, 1972, (17,201), are subtracted from the 8th District and added to the 6th District, and if the population of 72-4, as such precinct was established in January, 1972, (1,281), is subtracted from the 8th District and added to the 7th District, the populations of the Districts will be as follows:

6th District	490,261
7th District	488,864
8th District	491,549

APPENDIX B

PHILLIPS, Chief Circuit Judge. (Concurring.) I concur in the results in the opinion prepared by Judge Brown and in all parts of that opinion with one exception. I would hold that, as a matter of law, we are bound by the 1970 "head count" of the federal census figures and should not consider estimated population shifts that may have occurred since that time. In determining the population of the voting precincts of Shelby County here in question, we should accept the best available population interpolations with respect to the 1970 census, and not changes that are estimated to have taken place since the taking of that census.

I was one of the members of the three-judge district court which decided **Baker v. Ellington,** 273 F. Supp. 174 (M.D. Tenn. 1967), in which all Tennessee Congressional Districts were reapportioned. This was done on the basis of the 1960 federal census, and not on the estimated population shifts that had occurred during the ensuing seven years.

I agree with the opinion of Judge Brown that the estimated population shifts relied upon in the present case are not established by "clear, cogent and convincing evidence." Nevertheless, even if the evidence of population shifts should be sufficient to meet this high standard, I do not see how we could make changes (or decline to make changes, as suggested in the dissenting opinion), without bringing into question the correctness of the population of the

other Congressonal Districts of the State, and of the population of the remaining portions of the Sixth, Seventh and Eighth Congressional Districts, all of which are based upon the 1970 federal census.

Harry Phillips
Chief Circuit Judge
Date: March 25, 1976

APPENDIX C
DISSENTING OPINION

(of Judge Harry W. Wellford)

I respectfully dissent from the majority opinion, because census estimates supported by other clear and objective data convince me that this Court should not in 1976 act on the basis of interpolated 1970 figures. The 1970 U. S. Census figures utilized by the Court as a basis for its decision were founded upon Memphis and Shelby County Planning Commission interpolations of 1970 census population figures from census tracts which were not co-extensive with wards and precincts located within the Sixth, Seventh, and Eighth Congressional Districts within Shelby County, Tennessee. Upon this stipulated 1970 information as to the population of these three Districts -- 473,060, 487,583 and 510,031, respectively, it was ruled that malapportionment existed in the Sixth and Eighth (1) Congressional Districts, but action was deferred pending an opportunity for the 1975 Tennessee legislature to study, investigate and act, as appropriate, with respect to any necessary re-apportionment.

The particular circumstances pertaining to the division of Shelby County into three Congressonal Districts had been the subject of considerable legislative scrutiny in 1972 when the impact of ward and precinct designation became apparent within the largest County in the State. No action was taken:

(1) Located entirely within the City of Memphis.

subsequently this suit was then instituted by several citizens seeking to bring about by judicial action what the Tennessee legislature had declined to undertake.

Although the matter was called to the attention of the Tennessee legislature, no action was taken by that body during the 1975 sessions to affectuate any change in the Sixth, Seventh or Eighth Congressional Districts. (2) Plaintiffs, by new counsel, moved for supplementary relief in accordance with the bill which failed in the State Senate, but received House approval. Intervenors, one group of residents of the Seventh Congressional District, sought essentially to preserve its present make-up; another, the Shelby County Republican Party, opposed the proposal of redistricting and set forth its own plan premised on further population data after 1970.

All of the parties agree on one principal issue -- that if any adjustments were to be made there should be a transfer of certain wards and precincts within Shelby County only, not any shift of Counties within the present Districts which are situated in the west-

(2) A bill to change the composition of these Districts passed the Tennessee House, but failed to pass in the State Senate by a bipartisan vote of the Senators from the affected area of West Tennessee (two of the Democrat majority Senators cast a "no" vote from the Sixth Congressional District, representing the 22nd and 23rd State Senate Districts.) The one independent Senator in the Senate was recorded as not present (see vote tabulation attached as Table 1).

ern portion of the State. The State legislature may consider the most reliable indicator of population in arriving at a decision respecting apportionment or reapportionment of Congressional Districts. **Exon** v. **Tiemann,** 279 F. Supp. 603, 608 (D. Neb. 1967; 3 Judge Court); **Meeks** v. **Avery,** 251 F. Supp. 245 (D. Kan. 1966; 3 Judge Court); **Gong** v. **Kirk,** 278 F. Supp. 133 (S. D. Fla. 1967; 3 Judge Court); **Aff'.,** 389 U. S. 574 (1969); **Wells** v. **Rockefeller,** 273 F. Supp. 984 (S. D. N. Y. 1967; 3 Judge Court). (3) It may be presumed that the Tennessee legislature considered later data concerning population of the Districts in question during its 1975 Sesson, subsequent to 1970 census data. Prior to the vote in the Senate, the United States Census Bureau issued new estimates of the population of Congressional Districts in the United States (Dept. of Commerce News, CB 75-64, 3/21/75) which showed estimates for July 1, 1974, of the Districts to be:

Sixth	518,000
Seventh	520,000
Eighth	504,000

The average population of the eighth Congressional Districts in Tennessee was 516,125 according to this census estimate. In June of 1975, by a publication of the Department of Commerce, Bureau of the Census (Series P-25, No. 587) the 1973 estimates for Counties and populated places in Tennessee was explained in detail. It was found that comparisons

(3) **Affirmed,** 389 U. S. 421 (1967).

of the administrative determinations with federal-state co-op estimates (4) were favorable and the "level of accuracy suggested by these averages is quite good," and, in summary, "yields results that compare favorably with existing methods and provides acceptable estimates, systematically, in geopraphic detail on a current basis not available from any other known source (short of a full-scale census)." Furthermore, it was concluded that "the level of accuracy of the estimates implied by the test results would appear to be acceptable for most uses where current population figures are required. It is in line with the quality level recommended or proposed for a variety of legislative purposes." The difference between administrative record estimates and co-op estimates, according to this report, was less than 3% in Counties with population between 10,000 and 25,000; and less than 2½% in Counties with more than 25,000 population (see Table 3). Indeed, the average percent difference between the population estimates using administrative records-based data and actual census counts in 1970 was less than 2 per cent. (Comparing entire Counties alone showed a 1.3 per cent difference). According to 1973 estimates, a June, 1975, census publication showed tremendous growth percentage-wise in suburban towns in Shelby County located in the Sixth Congressional District; Germantown 65 per

(4) Co-op estimates are those of the Census Bureau's Federal-State cooperative program for local population estimates.

cent from 1970 to 1973 (5); and Collierville 31 per cent during the same period. According to these same estimates, the City of Memphis (mostly comprising the Eighth District) grew a modest five per cent during this three year period (comparable generally to eight towns in agrarian Seventh District Tipton County). These various comparisons, however, demonstrated a general supportive accuracy of these official census estimates of 1973 and 1974.

Courts may also take into consideration orderly, objective and accurate records beyond the decennial census figures where substantial population shifts have been reflected.

Calkins v. **Hare,** 228 F. Supp. 824 (E. D. Mich. 1964); **Kirkpatrick** v. **Preisler,** 394 U. S. 526 (1969). Table 3 attached reflects that outside Shelby County, the population of the 19 Counties making up the Sixth Congressional District grew by an estimated 40,000 from 1970 to July 1, 1974. During this same period, the population growth outside Shelby County of the fourteen Seventh District Counties was only an estimated 16,500. Shelby County Election Commission figures show a steady and consistent growth of registered voters in Shelby County from 1970 through 1975 in the Sixth Congressional District towns in Shelby County, reflecting the large over-all

(5) Professor Pursell complained that a 1974 special census showed a much larger growth in Germantown than the 1973 estimate indicated, even taking into account a substantial annexation in January, 1974. increase in that Congressional District (see Table 4

attached). A comparison of registered voters in Shelby County from 1972 through 1975 shows a comparative shift from the Eighth Congressional District portion to the Sixth Congressional District further buttressing the estimates discussed (see Table 5 attached).

The census estimates as of July 1, 1974, for the three Congressional Districts within Shelby County reflect 89,800 for the Sixth; 141,100 for the Seventh; and 504,000 for the Eighth (see Table 3 and 6).

Thus, the 1974 census estimates would show approximately 12 per cent of the Shelby County population to be in the Sixth Congressional District, approximately 19 per cent in the Seventh, and nearly 69 per cent in the Eighth. At the same time, the percentage of registered voters and actual voters within Shelby County during 1974 and 1975 was about 15 per cent in the Sixth Congressional District and in the Seventh Congressional District (see Tables 5 and 7). This would clearly tend to indicate that the population of the Sixth Congressional District in 1974 (and 1975) exceeded that of the Seventh and Eighth Districts ,particularly when it is taken into consideration that the "growth" Counties from 1970 to 1974 were virtually all located in suburban Shelby (outside the City of Memphis) and those Counties surrounding Nashville and Davidson County. (6)

(6) Williamson, Dickson and Montgomery Counties grew more than any other Counties (except Lewis) all in the Sixth Congressional District. This has been a continuing pattern since the 1960 census. (See Table 8 attached).

Most cities in the United States lost population during the 1960-1970 era, except for gains in the suburban surrounding areas by way of annexation. The 1960 City Limits of Memphis, for example, contained, according to the census, 497,524 persons. That same area had, according to the 1970 census, only 486,968 persons. Growth of 136,562 occurred through annexation into some areas of the Sixth and Seventh Congressional Districts as constituted in 1970. (Statistical Abstract, U. S. Census, Tenn. Vol. 1, Part A, Sec. 2, Table 44-14). The National Planning Data Corp. (NPDC) by contract with the Census Bureau assisted in census tract estimates in 1974 and 1975 with regard to the division of Congressional Districts in Shelby County. The estimate of this company, engaged in statistical studies, showed approxmately 510,000 population in the Eighth Congressional District, some 1 per cent more than the census estimate itself. While that corporation's representative, Mr. Francese, testified as an expert called by the Shelby County Republican Party Intervenor, the Court was not persuaded by his independent testimony and analysis of the accuracy of his 1974-1975 estimates. It was strongly suggested, for example, that NPDC underestimated the Germantown population for that period by Professor Pursell, an expert hired by plaintiffs. To some considerable degree, however, these NPDC estimates, supported by

census administrative estimates and federal-state co-op efforts, as well as special census data taken since 1970, indicate clearly the growth of the Sixth Congressional District population relative to the Eighth District since 1970. The Seventh District has been demonstrated to have grown less since 1970, both within and without the Shelby County portion of that District. Professor Pursell, moreover, testified that Shelby County was losing and had lost black population by net migration at the rate of 7 per cent or 8 per cent per decade since 1960. Most of the black population in Shelby County lives within the City of Memphis, particularly the Eighth Congressional District. These references are supportive of the substantial accuracy of the Congressional District estimates made by the Census Bureau in 1974, particularly with regard to a stagnant, even a slackening, population since 1970 of the Eighth District inside the City Limits of Memphis.

The population trends discussed are satisfactorily documented and supported throughout West Tennessee to indicate reasonably and accurately substantially equal populations between the Sixth and Seventh Congressional Districts at the present time. The Eighth Congressional District is reliably estimated to be the smaller of the three. It would, therefore, be inappropriate and inequitable under the circumstances to force reapportionment as sought by plaintiffs, particularly in the face of legislative unwillingness to act in reference to subsequent demonstrated populaton adjustment.

I would, accordingly, decline to order a re-districting under the particular and peculiar circumstances here related. To follow plaintiff's suggestion, in my judgment, would be to aggravate further the indicated present imbalance between the three Congressional Districts involved. I would agree, however, that under normal circumstances the ordinary basis for apportionment would be decennial census figures, which are doubtless the most reliable and accurate basis for congressional apportionment as required by the Constitution and the law. **See Kirkpatrick** v. **Preisler, supra.**

I find and conclude that the circumstances and data alluded to are so convincing that this Court should decline to grant any of the parties relief requested; instead, the present ward and precinct make-up of Shelby County should be retained as to the Sixth, Seventh and Eighth Congressional Districts.

This 25th day of March, 1976.

HARRY W. WELLFORD, JUDGE

TABLE 1

SENATE BILL No. 734

DISTRICT	SENATOR: CITY	PARTY	VOTE
17	Blank: COLUMBIA	(D)	AYE
22	Harvill: CLARKSVILLE	(D)	NO
23	Sullivan: DICKSON	(D)	NO
24	Hamilton: UNION CITY	(D)	AYE
25	Thomas: JACKSON	(D)	AYE
26	Wilder: SOMERVILLE	(D)	AYE
27	Davis: COVINGTON	(I)	*
28	Gillock: MEMPHIS	(D)	AYE
29	Ford: MEMPHIS	(D)	AYE
30	White: MEMPHIS	(D)	AYE
31	Person: MEMPHIS	(R)	NO
32	Dunavant: MILLINGTON	(R)	NO
33	Talarico: MEMPHIS	(D)	AYE

*--NOT PRESENT

TABLE 2

(Map of Tennessee contained in original opinion)

POPULATION OF

CONGRESSIONAL DISTRICTS

First	490,518
Second	492,539
Third	486,363
Fourth	492,124
Fifth	490,178
Sixth	489,361
Seventh	488,984
Eighth	494,097
TOTAL	3,924,164
1970 Federal Census	3,924,164
Average District	490,521
Largest District (Eighth)	494,097
Smallest District (Third)	486,363
Greatest Plus Variance	+3,576
Greatest Minus Variance	—4,158
Total Variance from Largest to Smallest	7,734
Percent of Greatest Plus Variance	+0.729%
Percent of Greatest Minus Variance	—0.848%
Total Percent of Variance from Largest to Smallest	1.577%

TABLE 3

COUNTIES IN 6TH, 7TH, 8TH CONGRESSIONAL DISTRICTS UNDER TENN. CODE ANN. S 2-502, AS AMENDED IN TENN. PUB. ACTS OF 1972, CH. 733

SIXTH:	APRIL 1, 1970 CENSUS:	JULY 1, 1973 ESTIMATE:	JULY 1, 1974 ESTIMATE:	CHANGE 1970-1974 %
Chester	9,927	10,500	10,800	9.0
Decatur	9,457	9,600	9,600	1.9
Dickson	21,977	24,700	25,900	17.8
Fayette	22,692	22,800	25,700	13.2
Giles	22,138	22,500	22,900	3.2
Hardeman	22,435	22,300	22,500	0.2
Hardin	18,212	19,200	18,500	1.6
Henderson	17,360	18,700	19,200	10.7
Hickman	12,096	13,100	13,200	9.5
Houston	5,853	6,200	6,100	4.3
Humphreys	13,560	14,500	14,700	8.6
Lawrence	29,097	30,800	32,000	10.1
Lewis	6,761	7,700	7,900	16.4
McNairy	18,369	20,000	19,900	8.5
Maury	44,028	44,800	45,500	3.3
Montgomery	62,721	69,700	71,700	14.3
Perry	5,238	5,700	5,700	9.1
Wayne	12,365	12,900	13,100	5.7
Williamson	34,423	40,900	43,300	25.6
*Shelby	(722,111)	(732,300	(724,600)	(0.3)
TOTAL (EXCLUDING SHELBY)	388,709	416,600	428,200	

SEVENTH:	APRIL 1, 1970 CENSUS	JULY 1, 1973 ESTIMATE:	JULY 1, 1974 ESTIMATE:	CHANGE 1970-1974 %
Benton	12,126	12,400	12,100	0.1
Carroll	25,741	26,300	26,600	3.3
Crockett	14,402	14,700	14,800	2.6
Dyer	30,427	31,900	32,300	6.2
Gibson	47,871	48,500	47,700	-0.3
Haywood	19,596	20,500	20,700	5.8
Henry	23,749	25,200	26,100	9.9
Lake	8,074	7,900	7,700	-4.7
Lauderdale	20,271	21,300	21,300	5.2
Madison	65,774	69,800	69,300	5.4
Obion	30,247	32,100	32,100	6.0
Stewart	7,319	7,900	8,100	10.5
Tipton	28,001	28,900	29,900	6.9
Weakley	28,827	30,700	30,200	4.6
*Shelby	(722,111)	(732,300)	(724,600)	(0.3)
TOTAL (EXCLUDING SHELBY)	362,425	378,100	378,900	

NOTE: Estimates of U. S. Census Bureau and Tennessee State Planning Office.

TABLE 4

NUMBER OF REGISTERED VOTERS

6TH DISTRICT TOWNS IN SHELBY COUNTY

	1970:	1972:	1974:	1975:
Capleville	533	672	1464	1675
Collierville	1523	1839	2150	2666
Forest Hill	425	517	534	559
Germantown	1829	2785	5286	5912
Ross Store	381	418	471	635
	4691	6231	9905	11,447

(From Shelby County Election Commission)

NOTE: According to U. S. Census Bureau population estimates, in July, 1973, Collierville had a population of 4785 and Germantown a population of 5737. This reflected a three year growth from 3651 and 3474, respectively, from 1970 census figures*, a composite 47 per cent growth. Bartlett and Raleigh had comparable growth in the same period within the Seventh Congressional District area of Shelby County.

* The census figures do not coincide with the 1970 population interpolations from census data as to ward boundaries of these communities by the Memphis and Shelby County Planning Commission.

TABLE 5

REGISTERED VOTERS IN SHELBY COUNTY 6TH, 7TH, 8TH CONGRESSIONAL DISTRICTS

	July 3, 1972 and %:	Oct. 5, 1974, and %:	Oct. 22, 1975, and %:
Sixth	48,871 (13.7%)	52,808 (15.1%)	56,015 (15.4%)
Seventh	51,809 (14.5%)	54,454 (15.6%)	56,934 (15.6%)
Eighth	255,200 (71.8%)	242,517 (69.3%)	251,326 (68.9%)
TOTALS:	355,880	349,779	364,275

TABLE 6

Census Bureau -- Department New Release, dated March 21, 1975, (No. CB 75-64) gives the following population estimates as of July 1, 1974:

Sixth Congressional District	518,000
Seventh Congressional District	520,000
Eighth Congressional District	504,000

Thus, from the above total district figures, and the July 1, 1974, Census Bureau Population Estimates for Tennessee Counties, **Shelby County** residents would, as of 7/1/74, be apportioned as follows:

SHELBY COUNTY RESIDENTS:

Sixth Congressional District	89,800	(12.2%)
Seventh Congressional District	141,100	(19.2%)
Eighth Congressional District	504,000	(68.6%)

TABLE 7

NUMBER OF ACTUAL VOTERS-- SHELBY COUNTY

Sixth	38,118 (15 %)	32,031 (15.7%)	27,123 (14.8%)
Seventh	39,030 (15.3%)	26,886 (13.1%)	27,179 (14.8%)
Eighth	177,532 (69.7%)	145,595 (71.2%)	129,461 (70.4%)
TOTAL:	254,680	204,512	183,763

* November general election
(Per Shelby County Election Commission)

TABLE 8

According to Department of Commerce Population Estimates for counties prepared jointly by the Bureau of the Census and the Tennessee State Planning Office, the following counties reflected growth rates of at least eight per cent (8%) from the 1970 Census to July 1, 1974:

Williamson	6th	25.6%	8,877
Dickson	6th	17.8%	3,923
Lewis	6th	16.4%	1,539
Montgomery	6th	14.3%	8,979
Fayette	6th	13.2%	3,008
Henderson	6th	10.7%	1,840
Stewart	7th	10.5%	781
Lawrence	6th	10.1%	2,903
Henry	7th	9.9%	2,351
Hickman	6th	9.5%	1,104
Perry	6th	9.1%	462
Chester	6th	9.0%	873
Humphreys	6th	8.6%	1,140
McNairy	6th	8.5%	1,531

Only two (2) Counties (Lake and Gibson) based on the same estimates, both in the 7th District, lost population during this same four (4) year period.

Three (3) Counties near Nashville had an estimated increase of nearly 22,000 reflecting suburban growth in that area.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROSCOE DIXON, et al,
Plaintiffs,
VS.
CIVIL C-74-360
SHIRLEY HASSLER, Coordinator
of Elections, et al,
Defendants

ORDER

Pursuant to the opinion of this Court, filed March 25, 1976, in which it was held that the provisions of T.C.A. Section 2-1603 as applied to the wards and precincts of Shelby County, Tennessee, as the same existed on July 2, 1974, resulted in constitutionally invalid apportionment of the Sixth, Seventh and Eighth Congressional Districts, utilizing the 1970 Federal decennial census figures as interpolated which were found to be the most accurate figures available and controlling,

IT IS ORDERED that the Sixth, Seventh and Eighth Congressional Districts of Tennessee are hereby reapportioned so that the geographical configuration of the Congressional Districts' boundaries are established as set forth in T.C.A. Section 2-1603 applied to the wards and precincts of Shelby County, Tennessee, as the same were constituted as of March 31, 1971. This order results in a Sixth Congressional District population of 490,261, a Seventh Congressional District population of 488,864, and an Eighth

Congressional District population of 491,549, according to the 1970 census. A map of Shelby County, Tennessee, reflecting the geographical configuration of said Congressional Districts is attached as an Exhibit to this Order.

For The Court:
Bailey Brown,
Chief U.S. District Judge

APPENDIX E

ROSCOE DIXON, et al,
Plaintiffs,
V.
NO. C-74-360
SHIRLEY HASSLER, et al,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Republican Party of Shelby County, Tennessee, hereby appeals to the Supreme Court of the United States from the judgment of the three-judge United States District Court declaring Section 2-1603, Tennessee Code Annotated, unconstitutional and ordering a change in the boundaries of the Sixth, Seventh and Eighth Congressional Districts of the State of Tennessee, said judgment being entered on the 5th day of April, 1976. This appeal is taken pursuant to authority contained in 28 U.S.C.A. S 1253.

HEISKELL, DONELSON, ADAMS,
WILLIAMS AND KIRSCH
2020 First National Bank Bldg.
Memphis, Tn. 38103

CERTIFICATE OF SERVICE

I, ROBERT WALKER, attorney for the Intervening Defendant, Republican Party of Shelby County, Tennessee, hereby certify that I have this 28th day of April, 1976, served on all counsel of record herein a copy of the foregoing Notice of Appeal by depositing the same in the United States Mail, first class postage prepaid.

Robert Walker

Supreme Court, U. S.
FILED
OCT 4
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-65

REPUBLICAN PARTY OF SHELBY COUNTY, TENNESSEE,
Appellant,

v.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAY WEATHER, and RONALD K. HOOKS, Individually on Behalf of Themselves and All Other Resident Citizens and Qualified Electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM AUSTIN, Shelby County Election Commissioners; and THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION OF THE COORDINATOR OF ELECTIONS AND SHELBY COUNTY ELECTION COMMISSIONERS TO DISMISS, OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-65

REPUBLICAN PARTY OF SHELBY COUNTY, TENNESSEE,
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v.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAY WEATHER, and RONALD K. HOOKS, Individually on Behalf of Themselves and All Other Resident Citizens and Qualified Electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM AUSTIN, Shelby County Election Commissioners; and THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION OF THE COORDINATOR OF ELECTIONS AND SHELBY COUNTY ELECTION COMMISSIONERS TO DISMISS, OR AFFIRM

OPINION BELOW

The opinion of the United States Three-Judge District Court for the Western District of Tennessee, Western Division was entered on March 25, 1976 (J.S. App., A-1—A-36) and is not yet reported.

JURISDICTION

The opinion of the United States Three-Judge District Court for the Western District of Tennessee, Western Division was entered on March 25, 1976. An order in accordance with the United States District Court's opinion was entered on April 5, 1976. (J.S. App., A-35—A-36). Notice of appeal was filed in the United States District Court, Western District of Tennessee, Western Division, on April 30, 1976. (J.S. App., A-37). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Having determined that Tennessee's congressional districting statute was unconstitutional, was the District Court, as a matter of law in fashioning a remedy in 1976, confined to the 1970 decennial census population figures?

2. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 in judicial enactment of a new congressional redistricting statute?

3. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 to show that a malapportionment that may have existed in 1970 has corrected itself as a result of population shifts?

STATUTE INVOLVED

Tennessee Code Annotated (T.C.A.), § 2-1603, as amended in 1972, establishes Tennessee's eight (8) congressional districts.

The validity of subsections 6, 7, and 8, which establish the sixth, seventh, and eighth congressional districts respectively were at issue in the District Court. T.C.A. § 2-1603 provides in pertinent part as follows:

> "The State of Tennessee is divided into the following eight (8) congressional districts:
>
> * * * * * * *
>
> "(6) The sixth congressional district is composed of the counties of Chester, Decatur, Dickson, Fayette, Giles, Hardeman, Hardin, Henderson, Hickman, Houston, Humphreys, Lawrence, Lewis, McNairy, Maury, Montgomery, Perry, Wayne, Williamson and the following voting wards, precincts and districts of the city of Memphis and Shelby County: 56-2, 60-5, 67-1, 67-2, 67-3, 68-2, 73-1, 73-2, 74-1, 74-2, 78-1, 78-2, 78-3, 79-1, 79-2, 80, 81, Capleville, Collierville, Forest Hills, Germantown and Ross' Store."
>
> "(7) The seventh congressional district is composed of the counties of Benton, Carroll, Crockett, Dyer, Dibson, Haywood, Henry Lake, Lauderdale, Madison, Obion, Stewart, Tipton, Weakley and the following voting wards, precincts and districts of the City of Memphis and Shelby County: 68-1, 69-1, 69-2, 70-1, 70-2, 71-1, 71-2, 72-2, 72-3, Arlington, Bartlett, Brunswick, Cordova, Eads, Ellendale, Kerrville, Locke, Lucy, McConnell's Millington, Morning Sun, Mullins, Raleigh I, Raleigh II, Raleigh III, Scenic Hills, Stewartville and Woodstock."
>
> "(8) The eighth congressional district is composed of all the remaining voting wards, precincts, and districts of the City of Memphis and Shelby County not established as a portion of the sixth and seventh congressional districts as set out above."

STATEMENT OF THE CASE

This action was instituted on July 2, 1974 in the United States District Court for the Western District of Tennessee, Western Division by Roscoe Dixon and other individual plaintiffs who were registered voters in the sixth, seventh and eighth congressional districts of Tennessee. These plaintiffs, now appellees, sought declaratory and injunctive relief based upon their allegations that the sixth, seventh and eighth congressional districts of Tennessee were unconstitutionally malapportioned. T.C.A. § 2-1603 was enacted by the Tennessee General Assembly in 1972 to provide reapportionment of Tennessee's congressional districts based upon the 1970 decennial census.

The United States District Court denied appellees' application for a preliminary injunction prior to the primary election to be conducted on August 1, 1974 in view of the short length of time until that election.

At a hearing conducted on September 24, 1974, the parties stipulated that the population of the sixth, seventh and eighth congressional districts, according to the 1970 United States Census, as interpolated by the Memphis and Shelby County Planning Commission, was 473,060, 487,583 and 510,031, respectively. The parties further stipulated that the optimum population per congressional district was 490,615.

On December 26, 1974, the District Court held that based upon the 1970 United States Census figures, the sixth and eighth congressional districts of Tennessee were malapportioned. The District Court deferred any action upon its finding of malapportionment noting that the Tennessee General Assembly was due to convene in January, 1975 and that the legislature would have the opportunity to correct the malapportionment. The Tennessee General Assembly did consider reapportionment at its 1975 session, but the bill providing for the reapportionment of the sixth, seventh and eighth congressional districts was not enacted.

Appellant intervened in this cause on October 22, 1975 and urged the District Court to consider Bureau of the Census estimates of population in the sixth, seventh and eighth congressional districts as of July 1, 1974. The parties agreed that proof of the validity of these population estimates and proof against the validity of the evidence would be taken by deposition. Appellant presented the deposition of Peter K. Francese of the National Planning Data Corporation in support of the population estimates and appellees presented the deposition of Donald E. Pursell, a labor economist and demographer at Memphis State University, in opposition to the validity of the population estimates.

On March 25, 1976 the majority opinion of the District Court, written by Chief District Judge Bailey Brown, found that the District Court was not bound, as a matter of law, to the 1970 census figures in reapportioning the congressional districts in question. (J.S. A-10). The majority opinion further held that although population estimate might be used for reapportionment, the decennial census figures are controlling unless there is "clear, cogent and convincing evidence" that the census figures are invalid and that other figures are valid. (J.S. A-10, A-11). After summarizing the testimony of appellant's expert witness, Mr. Peter K. Francese, the majority opinion concluded that appellant had not presented ". . . clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current population . . ." of the sixth, seventh and eighth congressional district. (J.S. A-13). The District Court held that the sixth and eighth congressional districts should be reapportioned by adding 17,201 persons to the sixth and subtracting a like number from the eighth.

Chief Circuit Judge Harry Phillips concurred in the results of the majority opinion but would have held that the District Court was bound, as a matter of law, by the 1970 census figures. (J.S. A-18—A-19). District Judge Harry W. Wellford dissented stating that the Bureau of the Census figures were sufficiently valid and should have been considered by the Court. (J.S. A-20—A-28).

ARGUMENT

Pursuant to Rule 16(c) and (d) of this Court, the Coordinator of Elections and Shelby County Election Commissioners move to dismiss the appeal on the ground that the questions on which the decision of this cause depends are so insubstantial as not to need further argument, or, in the alternative, to affirm the decision of the District Court on the ground that the questions presented challenge the District Court's factual findings and conclusions which have not been shown to be "clearly erroneous."

I

The Questions on Which the Decision of This Cause Depends Are So Insubstantial as Not to Need Further Argument.

The Coordinator of Elections and the Shelby County Election Commissioners are aware of no case in which a *court* has drawn congressional district boundaries using population figures of a source other than a decennial federal census. Appellants cite *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb., 1968), *Meeks v. Avery*, 251 F. Supp. 245 (E.D. Kan., 1966) and *Gong v. Kirk*, 278 F. Supp. 133 (S.D. Fla., 1967) aff'd. 389 U.S. 574 (1968) as cases in which the courts, either by approval or by the action of the Court itself, have used data other than the decennial federal census in fashioning a reapportionment of congressional districts. These appellees respectfully submit that these authorities do not support appellant's contention that population estimates, rather than figures from the 1970 decennial census, should have been used by the District Court in the case at bar.

In *Exon v. Tiemann, supra.*, the Court approved a *state-wide* redistricting plan which had been passed by the Nebraska legislature, and bolstered its approbation by citing not only 1960 federal census figures, but also a 1966 University of Nebraska

estimate, and a 1967 Legislative Research Bureau projection. In *Meeks v. Avery, supra.*, the court approved a legislative redistricting bill which utilized a state enumeration required by state law where ". . . its accuracy was not questioned." 251 F. Supp. 245, 249. The difference between an ideal district according to the state census of 1964 and the federal census of 1960 was only 385 persons. The Court upheld the action of the Kansas legislature as it had made an honest and good faith effort to construct congressional districts as nearly of equal population as is practicable. Citing *Reynolds v. Sims*, 377 U.S. 533 (1964). Cf. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). In neither of the above cases did the courts determine for the first time a matter of redistricting not founded upon a decennial census.

Appellant's reliance upon *Gong v. Kirk, supra.* is also misplaced since the basis of the Court's redistricting plan in *Gong* was the 1960 decennial census. In discussing the population figures to be utilized, the Court noted:

> "The federal decennial census meets the minimal requirements of the equal protection clause, and no other census or population computation has been shown to be accurate." 278 F. Supp. 133, 134.

The District Court's reapportionment plan in *Gong* utilized a ratio formula which was *based* upon the 1960 decennial census.

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population *as shown by the 1960 decennial census;* i.e., county registration is to county population as precinct registration is to precinct population. This formular was suggested by both plaintiffs and defendants." 278 F. Supp. 133, 135 (Emphasis added).

As opposed to the utilization of "population estimates" for reapportionment, courts have consistently recognized the correctness of decennial federal census data and have judicially noted such data. In *Skolnick v. Board of Commissioners of Cook County*, 435 F.2d 361 (7th Cir. 1970), a complaint filed in 1966 alleged a violation of the one man-one vote principle according to the 1960 federal census figures. At the time of the appeal, the 1970 decennial census figures were available. Judicially noting those figures, the appellate court held that the plaintiffs-appellants had no standing as the more recent figures demonstrated that they were over-represented. The court noted that other federal courts had frequently judicially noticed federal census data, citing *Granville-Smith v. Granville Smith*, 349 U.S. 1 (1955); *Grills v. Branigan*, 284 F. Supp. 176 (S.D. Ind. 1968), aff'd sub nom *Branigin v. Duddleston*, 391 U.S. 368 (1967); *Baker v. Clement*, 247 F. Supp. 886 (M.D. Tenn. 1965); *Daniel v. Davis*, 220 F. Supp. 601 (E.D. La. 1963).

In *Grills v. Branigin, supra.* the Federal District Court in 1968 redistricted the State of Indiana on the judicially noted 1960 federal census although "the communities of the state have grown disproportionately in population." 284 F. Supp. 176, 180. The Court noted that the number of congressmen apportioned to Indiana was based upon the 1960 census and not upon any other governmental or private census and that that number could not be changed until the next federal census. It stated that the 1960 federal census was to be "tolerated until the next official census in order to maintain relative political stability." Id.

The Seventh Circuit has stated unequivocally that a physical head count has been shown to be the most reliable method

which can be used. *Skolnick v. Mayor*, 415 F.2d 1291, 1299 (7th Cir. 1969). In 1967 Tennessee was redistricted utilizing 1960 federal census figures. Apparently the court judicially noted these figures. *Baker v. Ellington*, 273 F. Supp. 174 (M.D. Tenn. 1967).

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), this Court, in holding that equal representation required states to make a good-faith effort to achieve precise mathematical equality in congressional districts, commented that the best population data available to the Missouri legislature in 1967 was the 1960 United States census figures. 394 U.S. 526, 528. The Court also stated:

> "We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be *thoroughly documented* and applied *throughout the State* in a systematic, not an *ad hoc*, manner." 394 U.S. 526, 535 (Emphasis added).

These appellees respectfully assert that this Court in *Kirkpatrick, supra*, has adequately addressed the questions which appellant seeks here to raise. *Kirkpatrick, supra*, it is submitted, recognized that decennial federal census figures are normally the best guide for congressional redistricting plans. Appellees respectfully submit that the District Court was correct in requiring "clear, cogent and convincing" evidence that other population figures were more accurate than the decennial census figures. Likewise, the District Court was correct in holding that *Kirkpatrick, supra*, would only allow application of popula-

tion estimates on a statewide basis and would not permit the application of population estimates to three (3) of Tennessee's eight (8) congressional districts. Logic would dictate that if Representatives are to be apportioned equally within a state, the same population figures must be utilized in the apportionment. As previously noted, the 1970 decennial census was utilized in constituting the five (5) other congressional districts in Tennessee under T.C.A. § 2-1603, and the District Court correctly utilized those figures to reapportion the sixth and eighth congressional districts.

II

The Questions Presented Challenge the District Court's Factual Findings and Conclusions Which Have Not Been Shown to Be "Clearly Erroneous."

As noted above, the basis of the District Court's ruling that it would not consider the population estimates submitted by appellant was because appellant had not presented ". . . clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current population . . ." of the sixth, seventh and eighth congressional districts. (J.S. A-13). This determination is, of course, a factual conclusion of the District Court based upon the evidence presented in that Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

This Court has held that, "[t]he findings and conclusions of the District Court are, of course, governed by the 'clearly erro-

neous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corporation*, 415 U.S. 486, 508 (1974).

The Coordinator of Elections and Shelby County Election Commissioners respectfully submit that appellant has not shown the findings of the District Court to be "clearly erroneous."

CONCLUSION

Based on the foregoing it is respectfully submitted that this appeal should be dismissed, or the decision of the District Court affirmed, because the questions presented do not raise a substantial question and the questions presented challenge the District Court's factual findings which have not been shown to be clearly erroneous.

Respectfully submitted,

WILLIAM C. KOCH, JR.

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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE,
APPELLANT,

vs.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and
THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
APPELLEES.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION TO AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE

vs.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and
THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT

ON DIRECT APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee moves to affirm the judgment of the District Court.

STATEMENT

This case concerns a determination of whether the Courts should involve themselves further in the legislative process of apportioning congressional districts. The appeal was taken from the decision of the court below to reapportion the congressional districts using the 1970 decennial census as the population measurement basis.

The Appellant's statement of the questions presented by the appeal is inaccurate, at least in part. First, the question of whether the District Court was, as a matter of law, confined to the 1970 Decennial Census population figures is a valid question involved herein. However, the other two stated questions found on pages 5 and 6 of the Jurisdictional Statement are inaccurate. First, the adjective "official" does not apply to the estimates of population sought to be used by the appellant. Second, the estimates sought to be used are subcounty estimates which are, as admitted by the Appellant's own witness, inaccurate. (See Deposition of Francese)

(1) The judgment of the three-judge District Court should be affirmed because the Court was confined, as a matter of law, to using the 1970 decennial census as the measurement of population for reapportionment. The Court found Tennessee Code Annotated § 2-1603, as applied to the wards and precincts of Shelby County, Tennessee, to be an unconstitutional division of population. That decision was based upon measurement of the population according to the 1970 United States Decennial Census, as interpolated by the

Memphis and Shelby County Planning Commission, the same being *stipulated* by the parties and found to be "the most accurate figures available and controlling" by the District Court.

(2) Not only was the District Court's decision based upon an accurate *factual* determination but is required in order to prevent unwarranted judicial intervention in what is primarily a legislative policy consideration. At the outset, it should be recognized that the challenge to the constitutionality and the District Court's determination of the unconstitutionality of Tennessee's apportionment statute dealt only with *division* of population and not with the legislatively determined method of population *enumeration*.

At no time has there been any challenge to the constitutionality of Tennessee Code Annotated, § § 2-1602, 2-238, 2-303, or 2-309 which are the statutory enactment of the Tennessee General Assembly's selection of the method of enumerating population for apportionment purposes. The only statute challenged below was § 2-1603, the statute that divided population already enumerated.

Moreover, the position advocated by the Appellant opens an ever continuing "Pandora's Box" of neverending court reevaluation of methods for determining population for apportionment purposes, totally destroying any vestige of stability in the legislative process. Thus, it is submitted:

(1) The choice of the method of population determination is a legislative function;

(2) The state legislature is free to choose any reasonable method of population measurement;

(3) The General Assembly of Tennessee has unequivocally chosen the federal decennial census as the method for measuring population for the purposes of apportioning Representatives among various districts;

(4) The method chosen is a constitutionally legitimate legislative policy determination;

(5) No cogent reason exists for any deviation from this legislative decision; and

(6) The "estimates" proposed by Appellant violate the constitutional and statutory requirements of an "enumeration" or "count" of population and imposes instead an inaccurate guessing game based upon invalid premises.

ARGUMENT

In dealing with the apportionment of Representatives among the States, the United States Constitution speaks through Art. I, § 2, Cl 3, which provides in pertinent part:

> *Representatives . . . shall be apportioned among the several states . . . according to their respective numbers . . . . The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and in every subsequent term of ten years, in such manner as they shall by law direct. (Emphasis added.)*

and Amendment XIV, § 2 which provides:

> *Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. (Emphasis added.)*

At the outset, it is clear that the Constitution provides that Representatives shall be apportioned according to an "enumeration" or "counting" of the persons who inhabit the various states. While the purpose of the above constitutional provisions was to provide for the apportionment of the Representatives, the right which is protected is *the right to vote* as established by the laws and constitution of the individual states. *Lassiter v. Northampton County Board of Elections*, 360 U. S. 45 (1959).

The Constitution requires that in order that Representatives be properly apportioned among the various states, there must be an "enumeration" or "counting" of the people. Congress, in carrying out these constitutional mandates, has provided that the decennial census be used as the method of population determination. 2 U.S.C. § 2(a). Upon the determination of population by the use of the said census, the Representatives are apportioned *among* the various states. These provisions, constitutional and statutory, deal with apportionment *among*, not *within*, the states. *Meeks v. Avery*, 251 F. Supp. 245 (E. D. Ks. 1966).

The method of apportioning the state's number of Representatives within the state among its internal

population is primarily a legislative function. *White v. Weiser*, 412 U. S. 783, 784 (1973). It follows logically, therefore, that the method of determining population figures by which this internal apportionment is to be effected is likewise a legislative function. While the equal protection clause requires that the value of one man's vote in a congressional election be worth, as nearly as is practicable, that of another, *Baker v. Carr*, 369 U.S. 188 (1962); *Westberry v. Sanders*, 376 U.S. 1, 9 (1964), the actual method by which this is to be effected is left to the states. See *Preisler v. Sec. of State of Missouri*, 257 F. Supp. 953 (D. Mo. 1966), aff'd 385 U.S. 450. This approach is entirely consistent with the idea that "reapportionment is primarily a legislative consideration," as recognized by this Court in *White v. Weiser, supra*, and by the District Court in its *per curiam* opinion of December 26, 1974. While the Tennessee legislature failed to act pursuant to its constitutional responsibility to reapportion the constitutionally invalid Districts, it must be remembered that the invalidity lay in the *division* of the population into districts, not in the method of enumeration of the population itself. The intervention of the District Court was necessary only in dividing the *enumerated population* into properly apportioned districts, *Long v. Avery*, 251 F. Supp. 541 (1966), not in redetermining the method of measurement of the population itself.

The General Assembly of Tennessee has chosen the federal enumeration of population in the decennial census as the basis for apportionment of its representatives among the districts within the state. This is evident from a cursory reading of Tennessee

Code Annotated, §§ 2-238, 2-303, 2-309, and 2-1602:

2-238. Preparation of periodic lists of newly registered voters in counties having a population in excess of 180,000 — Public purchase. —

In counties of this state having a population in excess of one hundred eighty thousand (180,000), according to the United States census of population of 1970, or any subsequent United States census of population, it shall be the duty of the commissioners of elections to prepare or cause to be prepared each month a listing, by voting precinct, of all persons registered to vote in each precinct during the preceding month. . .

(Acts 1972 (Adj. S.), ch 675, §1) (Emphasis added.)

2-303. Maximum size of precincts. — Precincts where voting machines are used shall, whenever practicable, in the judgment of the county election commission, after taking into consideration all facts and circumstances, be limited in size to a maximum of three thousand (3,000) registered voters, provided, however, that in counties having a population of over seven hundred thousand (700,000) by the 1970 federal census or any subsequent federal census, no precinct where voting machines are used may exceed three thousand (3,000) registered voters. (Acts 1972 (Adj. S.), ch. 740, § 1; 1974 (Adj. S.), ch. 413; § 1; 1974 (Adj. S.), ch. 676, § 1.) (Emphasis added.)

2-309. General assembly members, congressional representatives, presidential electors, governor and public service commissioner — Time for elections. — Elections for the following offices shall be held at the regular November election when the election immediately precedes the commencement of a full term:

(a) Representative in the general assembly;

(b) Representative in the United States congress;

(c) . . . (Acts 1972 (Adj. S.), ch. 740, § 1.) (Emphasis added.)

2-1602. Establishment of congressional districts. — The general assembly shall establish the composition of districts for the election of members of the house of representatives in congress after each enumeration and apportionment of representation by the congress of the United States. The districts may not be changed between apportionments. (Acts 1972 (Adj. S.), ch. 740, § 1.) (Emphasis added.)

These statutory enactments of the Tennessee legislature indicate the legislature's valid desire to establish political stability in apportioning the state's representatives. Tennessee Code Annotated, § 2-1602. The intent of the Tennessee legislature was to establish that the "count" or "enumeration" to be used in the

determining of the composition of the various districts within the state was to be that count obtained by United States Census of Population of 1970, or any subsequent United States Census of Population, the same method chosen by Congress for measuring population for apportionment among the states. Therefore, the Tennessee legislature, while not effecting a reapportionment plan pursuant to the directions of the District Court in its *per curiam* opinion of December 26, 1974, nevertheless clearly determined the method for counting the people in order to determine the composition of the various districts under any apportionment plan. This method was not found to be unconstitutional by the Court below. [1]

The choice of the Tennessee legislature to use the decennial census as the measuring basis is reasonable and proper. *Chavis v. Whitcomb*, 307 F. Supp. 1362 (S. D. Ind. 1969); *Grills v. Branigan*, 284 F. Supp. 176 (S. D. Ind. 1968). [2] In both of these cases, the court approved

(1) As stated above, the only statute found to be unconstitutional was Tennessee Code Annotated, § 2-1603. The other various statutes, §§ 2-1602, 2-309, 2-303, and 2-238 were not challenged. Only the division statute was challenged, not those determining the method of enumeration.

(2) The United States Supreme Court, in the joint cases of **Branigan v. Duddleston** and **Summers v. Duddleston,** 391 U.S. 364 (1968), affirmed the decision in **Grills v. Branigan.** The **Grills v. Branigan** case found in 284 F. Supp. is the decision of the Indiana District Court, a three judge panel, rendered upon the remand as a result of the reversal of the decision of that Court in **Grills v. Branigan,** 255 F. Supp. 155 (S. D. Ind. 1967) by the Supreme Court in **Duddleston v. Grills,** 385 U.S. 455 (1967). The District Court, in both cases, determined that the correct basis for reapportionment was the use of the 1960 Federal Decennial Census. This Honorable Court affirmed this second position by its memorandum decision in the above referenced twin cases.

the use of the decennial census, even though outdated, in considering redistricting in Indiana. The three judge court stated:

> *The Census of 1960 must be tolerated until the next official census in order to maintain relative political stability. Grilis v. Branigan, 284 F. Supp. 176.*

A consideration of the Indiana statutes then in effect evidences that the Indiana legislature, like that of Tennessee, used the federal census as its basis for population measurement. Compare Chapter 205, § 1, 1965 Acts of the Indiana General Assembly, Chapter 261, § 9, 1965 Acts of Indiana General Assembly with Tennessee Code Annotated, §§ 2-238, 2-303; 2-309; 2-1602. Thus, the District Courts in *Chavis* and *Grills*, both *supra*, were bound to use the same population measurement as dictated by the legislature.

Clearly, the Tennessee legislature, as well as Indiana's, could have chosen another method to measure population. For example, the use of impartial and accurate population estimates, *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968), [3] or the use of "any available population figures they can muster," *Wells v.*

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(3) The earlier **Exon** case, **Exon v. Tiemann**, 279 F. Supp. 603 (1967) found the **division** of population unconstitutional in that it created impermissible population variances. However, there was no rejection of the use of the federal census as the method of population determination. In **Exon II**, the legislature chose to use estimates. 279 F. Supp. at 611. The Court did not use estimates to redistrict.

Rockefeller, 273 F. Supp. 984, 991 (S.D.N.Y. 1967), were open to use by the Tennessee legislature. See also, *Meeks v. Avery*, 251 F. Supp. 245 (E.D. Ks. 1966), where the Kansas legislature used a state census as the method of enumeration. However, the Tennessee legislature chose the decennial census as the measuring basis. Having done so, the District Court below was foreclosed, as was the Southern District Court of Indiana, from substituting another basis for measurement. The choice of method of determination of population basis is an "exercise of judgment in the legislative process." *Meeks v. Avery, supra* at 250. To invade this province would substitute unwarranted judicial intervention for valid legislative policy determinations. This Honorable Court has unequivocally rejected such intervention in reapportionment cases:

> *Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preference of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. White v. Weiser, supra, 412 U. S. at 795. (Emphasis added.)*

The District Court properly should have proceeded no further than was required to formulate a constitutionally sufficient apportionment plan consistent

with the policy determinations of the Tennessee legislature. *Chapman v. Meier,* 372 F. Supp. 371 (D.N.D. 1974). To abrogate Tennessee's choice of using the decennial census would be to "intrude upon state policy" more than is necessary. *Whitcomb v. Chavis,* 403 U.S. 124, 160 (1971). [4]

The Appellant's reliance upon the Court's language in *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), indicating that *States* "may properly consider" population shifts that "can be predicted with a high degree of accuracy", is misplaced. That States may consider accurate estimates is not tantamount to allowing courts to supplant valid legislative policy determination as Appellant advocates. [5]

Chavis v. Whitcomb, 307 F. Supp. 1362 (S. D. Ind. 1969), was the state legislative apportionment companion case with *Grills v. Branigan.* In dealing with the equal protection clause, the District Court of Indiana again used the 1960 Census even though outdated. The Court found that the state legislature was not properly apportioned. This Honorable Court in *Whitcomb v.*

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(4) Further, it should be remembered that the figures as to population (pursuant to the 1970 census as interpolated) have been stipulated herein. It was upon these figures that the District Court found malapportionment in the first instance. To use other figures at the present stage of these proceedings is tantamount to a suggestion that the District Court's prior decision of malapportionment was founded upon an improper premise.

(5) Contrary to Judge Brown's opinion below, there is no indication in **Kirkpatrick v. Preisler** that Courts may use estimates where the legislature has determined otherwise. Both the majority and the concurring refer to the "State" use of census modifications, if accurate.

Chavis, 403 U. S. 124 (1971), reversed the District Court's finding that there had been invidious discrimination against racial groups. The Supreme Court cited the 1960 Census figures as the figures to use in apportioning the legislature, 403 U.S. at 161. In *Kirkpatrick v. Preisler,* 394 U.S. 526, 528 (1969), the Supreme Court determined that the "best population data" was the 1960 Federal Decennial Census for the apportionment of the congressional districts in the State of Missouri. [6]

It is the position of the Appellee that while the legislature of the State of Tennessee is left to choose whatever method of measurement of population figures it will, once it has chosen the method, the Courts are bound to that method so long as it is reasonable. The Supreme Court by its affirmance in *Branigan v. Duddleston* and *Summers v. Duddleston, supra,* and by its language in *Kirkpatrick v. Preisler, supra,* has indicated the acceptance of the Federal Decennial Census as a reasonable reapportionment population basis.

Finally, it is respectfully submitted that the "estimates" of the intervening Republican Party are just that — inaccurate, inexact, unofficial, partial estimates. They are not "enumerations" or population "counts" upon which the equal protection right to equal worth of a vote at the polls can be based. For one

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(6) Surely the equal protection clause gives as much protection to the value of one person's vote, if not more (since it deals with voting in a qualitative as well as a quantitative sense) as does Article 1, § 2.

example, the estimates are based, in part, on telephone and automobile figures. Use of these figures automatically excludes consideration of the poor who have no telephone or automobile and increases the vote value of those who are prosperous enough to have one, two, three or more of these luxuries.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of September, 1976.

TUAL, GORDON, TUAL & RILEY

BY: J. Houston Gordon

J. HOUSTON GORDON
312 South Main Street
Covington, Tennessee 38019

CERTIFICATE OF SERVICE

I, J. Houston Gordon, hereby certify that I have this 28th day of September, 1976, caused to be served upon: Mr. Jerome M. Hoffman, Attorney-At-Law, Suite 1234, 100 North Main Building, Memphis, Tennessee 38103, Mr. Alex B. Shipley, Jr., Assistant Attorney General, Supreme Court Building, Nashville, Tennessee, and Mr. Lewis R. Donelson and Mr. Robert Walker, Attorneys-At-Law, Suite 2020, First National Bank Building, Memphis, Tennessee 38103, a true and exact copy of the foregoing Motion to Affirm, properly addressed and with sufficient postage affixed thereto.

J. Houston Gordon

J. HOUSTON GORDON

Supreme Court, U. S.
FILED
OCT 1 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE,
Appellant,

VS.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,

Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION TO AFFIRM AND BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE,
Appellant,
VS.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; THE COMMITTEE FOR THE PRESERVATION and OF THE SEVENTH CONGRESSIONAL DISTRICT,

Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION TO AFFIRM AND BRIEF

Appellees, Roscoe Dixon, William Owens, Clym Cross, Lila Cross, Patricia Mayweather, and Ronald K. Hooks, move the Court to affirm the judgment sought to be reviewed on appeal on the ground that the decision of

the District Court upon the evidence was correct and that the questions on which the decision of the cause depends are not so substantial as to need further argument.

Jerome M. Hoffman
Leonard V. Hughes, Jr.
Attorneys for Appellees

STATEMENT OF THE CASE

The Tennessee General Assembly in 1972 enacted Tennessee Code Annotated, Sec. 2-1603 which provided for the redistricting of Tennessee's Eight Congressional Districts based upon the 1970 Decennial Census. The Congressional Elections of 1972 in Tennessee were held pursuant to that Statute. In July, 1974, individual Appellees, Roscoe Dixon, **et al.** sought an injunction in the District Court against the enforcement of the Statute and also a Declaratory Judgment that said districts were unconstitutionally apportioned and should be altered by the Court. The District Court refused to grant injunctive relief at that time since the 1974 Congressional Election process had begun, however, in a per curiam opinion on December 26, 1974, the Court held that based upon 1970 census population figures to which the parties had stipulated, the Sixth and Eighth Congressional Districts of **Tennessee were constitutionally malapportioned.** The Court deferred any action on its opinion in order to afford the Tennessee General Assembly the opportunity to study, investigate, and act, as appropriate, with re-

spect to any necessary redistricting. The Tennessee General Assembly in 1975 considered the redistricting issue but did not amend the Congressional Redistricting Statute.

Appellees, Roscoe Dixon, **et al.**, Plaintiffs in the District Court in July, 1975, moved for supplementary relief based upon the Declaratory Judgment and subsequently Appellant intervened. Appellees moved the Court to reapportion the Sixth, Seventh and Eighth Congressional districts of Tennessee in accordance with House Bill 1100 which passed the Tennessee House and its counterpart, Senate Bill 734, which failed by three votes in the Tennesssee Senate. Appellant urged the District Court to consider 1974 population estimates contending that any malapportionment which may have existed between the Sixth and Eighth Districts had been cured and changed by population shifts in the intervening period. It also proposed a plan rearranging the Sixth, Seventh and Eighth Congressional Districts based upon 1974 population estimates. The tract estimates upon which Appellant relied were made for each census tract in Shelby County, Tennessee by the National Planning Data Corporation and published on March 21, 1975, in the Department of Commerce News, C.B. 75-64. Since the entire Eighth and portions of the Sixth and Seventh Congressional Districts are within the county, census tract population was necessitated by reason of sub-county district lines. An explanation of the estimates was published in June of the same year by the Department

of Commerce, Bureau of Census (Series P-25, No. 587). The evaluation by the Bureau of Census indicated that while the "level of accuracy suggested by these averages is quite good . . . the coefficient of variation is in the neighborhood of 10 percent." Dr. Pursell who testified for Appellees likewise indicated that the average error is about 10 percent since the estimates were being made on a sub-county basis. Dr. Pursell further testified that the particular estimates made by the National Planning Data Corporation are statistically weak, often estimates based upon other estimates, and none of their estimates can be tested, since it refused to produce its basic equation by which it arrived at the estimates to test their accuracy. Even Appellant's expert, Mr. Francese, testified that the Bureau of the Census in purchasing the estimates did not adopt them or make any statement as to their validity or accuracy. He further testified that accurate sub-county estimates are very difficult because the necessary indicators to obtain accuracy are not available.

The opinion of the District Court of March 25, 1976, determined that it was not confined to 1970 Census figures and could consider 1974 estimates. The Court found, however, there was not presented clear, cogent and convincing proof that the 1970 Federal Census figures are not the best evidence of current populations of these districts. The Court further found that the proof necessary to establish the "provisional estimates" of the Bu-

reau of Census as the best evidence of such populations did not meet the standard required. Consistent with its previous holding of constitutional malapportionment, the Court further held that the Sixth, Seventh and Eighth Congressional Districts should be altered by returning those wards and precincts of Shelby County, Tennessee from the Eighth to the Sixth and Seventh Congressional Districts, respectively, from which they had come and had fallen into the Eighth District by the inadvertent action of the General Assembly when it enacted Tennessee Code Annotated, Sec. 2-1603 in April, 1972. The result was to make the populations of the three districts almost equal according to the 1970 Census as interpolated to which the parties had previously stipulated.

BRIEF FOR THE APPELLEES

OPINION BELOW

The Opinion of the Court entered on March 25, 1976, is now reported. **Dixon v. Hassler,** 412 F. Supp. 1036 (W.D. Tenn. 1976).

JURISDICTION

Jurisdiction to consider the appeal is admitted.

STATUTE INVOLVED

The Statute copied by Appellant in its Jurisdictional Statement is the one involved in this appeal. Jurisdictional Statement of Appellant at 3, 4, 5.

QUESTIONS PRESENTED BY THE APPEAL

1. Having determined that Tennessee's Congressional Districting Statute was unconstitutional, was the District Court, as a matter of law in fashioning a remedy in 1976, confined to the 1970 Decennial Census population figures?

2. Are "provisional estimates" published by the Bureau of Census compiled at the sub-county level highly accurate so they may be used in fashioning Congressional district lines within a county?

3. Was the evidence adduced in the District Court clear, cogent and convincing that the Decennial Census figures are no longer valid with respect to the sub-county census tracts?

4. Did the evedence adduced in the District Court indicate that the sub-county population estimates had a high degree of accuracy and were thoroughly documented?

ARGUMENT

Most Courts have been hesitant to use population figures other than those of the Decennial Census and some have held they may not, as a matter of law. **Grills v. Braningin,** 284 F. Supp. 176 (S.D. Ind) **aff'd. sub. nom. Branigin v. Duddleston,** 391 U.S. 364 (1968); **Chavis v. Whitcomb,** 307 F. Supp. 1362 (S.D. Ind. 1969); **Klahr v. Goddard,** 250 F. Supp. (D. Ariz. 1966);

Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes,, 253 F. Supp. 731 (D. Md.); **aff'd** 384 U.S. 315 (1966). The **Klahr** and **Tawes** cases present situations very similar, if not identical, to the one at bar since the proposed estimates were found not to be sufficiently certain and accurate to warrant use by the Court. It has been pointed out that the real danger in the use of other than Decennial Census figures appears when they become subject to challenge before each Congressional Election. **Priesler v. Secretary of State of Missouri,** 279 F. Supp. 952, 1003 (1967), **aff'd sub. nom. Kirkpatrick v. Preisler,** 394 U.S. 526 (1969). This, no doubt, might well produce a deluge of such litigation resulting in the erosion of the presumptive correctness of the Decennial Census and the political stability for which it was adopted. (279 F. Supp. 1002, 1003, 1004). There is, perhaps, much to be said for the position of those Courts which have chosen not to now enter into a "mathematical thicket". 253 F. Supp. at 734. Several of those District Courts which have dealt with the problem of using population figures other than those of the Decennial Census have returned to the reason for its inclusion in the Constitution. **Priesler v. Secretary of State of Missouri,, supra.** The Decennial Census was clearly part of the Great Compromise which ended the stalemate between the Founding Fathers at the Constitutional Convention of 1787. 3 **The Records of the Federal Convention of 1787** (Farrand ed. 1911) at 551. Such a periodic census was the proposal of Edmund

Randolph whose resolution basing future apportionments squarely on numbers and deleting any reference to wealth was overwhelmingly adopted. 1 Farrand, at 580, 606. It is significant to note that this Court often returns to that fundamental source when the question necessitates an answer within the historical context.

Wesberry v. Sanders, 376 U.S. 1 (1964). Both the majority and dissenting opinions in **Wesberry** v. **Sanders, supra,** discussed the intent of the Framers wherein this Court applied the rule of **Baker v. Carr,** 369 U.S. 186 (1962) to congressional apportionment. 376 U.S. at 17, 18, 30. In his dissent Justice Harlan pointed out that in all of the discussions surrounding the basis of representation of the House, there is nothing which suggests even remotely that the delegates had in mind the problem of districting within a state. 376 U.S. at 31, 32. It is submitted, **a fortiori,** that population estimates based upon sophisticated demographic formulae never entered the minds of our Fathers whose thoughts were directed to more fundamental and basic considerations.

While the Courts have had to consider the population estimate problem during the interim between each Decennial Census, the Congress after almost two hundred years of this republic has now taken action on legislation authorizing a mid-decade census. H.R. 11337, 94th Cong., 2d Sess.,, 122 Cong. Rec. H. 2998; S. 16559 (1976). This legislation enacted by both Houses in substantially the same form contains the following provision,

> Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor may such information be admitted as evidence or used for any purpose, except as otherwise provided in this subsection, in any action, suit, or other judicial proceeding in which the constitutionality of a State's congressional redistricting plan is at issue. If a State creates a congressional redistricting plan which is based upon any mid-decade census, this subsection shall not apply to prohibit the admission as evidence, or other use, of such information in any judicial proceeding in which the validity of such plan is at issue. H.R. 11337, 94th Cong., 2d Sess. Sec. 5 (1976).

While there have been legislative efforts to establish a mid-decade census during the last fourteen years in Congress, apparently the near-unanimous support from business and industry, users of statistical data, State and local governments and the Bureau of the Census has finally had its effect. Hearings on H.R. 2556 and H.R. 3704 Before a Subcomm. of the House Comm. on Post Office and Civil Service, 94 Cong., 1st Sess. 1 (1975). It is submitted that this legislation, if enacted, will to a great extent solve the problems regarding the use of population estimates between each Decennial Census.

The opinion of the District Court below concluded that estimates could be considered as a matter of law.

Jurisdictional Statement of Appellant, App. A at 10. It is submitted that this holding is farther than any District Court or this Court has been willing to go in undertaking the function of reapportionment. While Courts have permitted State Legislatures to use census estimates which qualify, no Court has been willing to undertake the legislative function of apportionment itself using other than Decennial Census population figures as a base. **Exon v. Tiemann,** 279 F. Supp. 603 (D. Neb. 1967); **Wells v. Rockefeller,** 389 U.S. 421 (1967(. Even in **Kirkpatrick v. Preisler, supra,** this Court was setting standards for the State Legislatures to follow in fashioning Congressional Redistricting plans. 394 U.S. at 535.

The evidence as to the accuracy of the use of the "provisional estimates" primarily consisted of the depositions of two experts, Dr. Donald E. Pursell and Peter K. Francese. (R. Doc. 66; 67). In its Jurisdictional Statement Appellant asserted,

> Although the expert testimony differed as to the estimates for individual precincts (which are building blocks for a redistricting plan), both experts agreed that the estimates for the entire Congressional District were accurate, and Mr. Francese stated that this accuracy was within one percent (1 percent). Jurisdictional Statement of Appellant at 20.

Appellees feel this statement is incorrect as to its con-

clusion of the testimony of Dr. Pursell and tends to mislead. First, Dr. Pursell indicated that the average error in Appellant's sub-county tract estimates is approximately ten (10) percent, whereas, the average error in county estimates would range between four and one-half (4 1-2) percent to six (6) percent depending on the size of the county. (R. Doc. 66 at 32). Dr. Pursell explained that while county estimates can be made with a higher degree of accuracy, Congressional District lines do not coincide with the county boundaries resulting in the problem in this case. (R. Doc. 66 at 83).

The difficulty in achieving accuracy is greatly increased in the use of population estimates on a sub-county level. The testimony of Appellant's expert indicated that it is very difficult since the necessary indicators to obtain proper estimates are not available. (R. Doc. 67 at 58, 65. He further testified that there is no method by which to test the accuracy of estimates unless a special census is taken. (R. Doc. 67 at 55, 61, 48). The testimony of Appellees' expert frankly admits that demographers have been unable to obtain a methodology to make sub-county estimates. (R. Doc. 66 at 12, 13, 55). He agrees that the indicators are not available, therefore, no sub-county estimate can be accurate. (R. Doc. 66 at 12, 13, 99). The Appellant through the testimony of its expert was unable to provide the documentation necessary as to the methodology and accuracy acceptable to those in the demographic field. (R. Doc 67 at 61, 88; Doc. 66 at 33, 34).

It was from this evidence that the District Court below found that the Appellant had not presented clear, cogent and convincing proof that the 1970 Federal census figures were not the best evidence of the current populations of these districts. Jurisdictional Statement of Appellant, App. A at 13. While Appellees may not agree with the opinion of the District Court below that estimates may be considered, they are convinced that the finding by the Court is overwhelmingly supported by the evidence and should be given the respect and weight to which it is entitled. **Best Medium Publishing Company v. National Insider, Inc.,** 385 F.2d 384 (7th Cir. 1967);**Aetna Casualty and Ins. Co. v. Hunt,** 486 F.2d 81 (10th Cir. 1973).

CONCLUSION

The decision of the District Court below based upon the evidence should be affirmed.

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CERTIFICATE OF SERVICE

I, LEONARD V. HUGHES, JR., one of the attorneys for Roscoe Dixon, William Owens, Clym Cross, Lila Cross, Patricia Mayweather, and Ronald K. Hooks, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of September, 1976, I have served copies of the foregoing Motion and Brief on all counsel of record herein by depositing same in the United States Mail, first class, postage pre-paid.

LEONARD V. HUGHES, JR.